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No. OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1996

AHMET AKTEPE, ET AL.,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Should the political question doctrine be judicially engrafted onto the Public Vessels Act so as to preclude the adjudication of foreign nationals' actions for damages caused by the negligence of the United States Navy during a war games exercise?

2. Does the constitutional concept of nonjusticiability (separation of powers) insulate the Executive Branch from judicial inquiry into the accidental killing and wounding of foreign nationals on the high seas?

## LIST OF PARTIES

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## PETITION FOR WRIT OF CERTIORARI

Ahmet Aktepe and his fellow plaintiffs respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

## OPINIONS BELOW

The order of the court of appeals (App. 31) denying rehearing and rehearing en banc is unreported. The panel opinion of the court of appeals (App. 1) is reported at 105 F.3d 1400. The opinion of the district court (App. 11) is reported at 925 F.Supp. 731.

## JURISDICTION

The court of appeals entered its order denying rehearing on May 28, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 1 of the Public Vessels Act, 46 U.S.C.app. § 781, provides that "[a] libel in personam in admiralty may be brought against the United States . . . for damages caused by a public vessel of the United States. . . . " Section 5, 46 U.S.C.app. § 785, states that "[n]o suit may be brought under this chapter by a national of any foreign government unless it shall appear to the satisfaction of the court . . . that said government, under similar

circumstances, allows nationals of the United States to sue in its courts." The Death on the High Seas Act, 46 U.S.C.app. § 761, states that "[w]henever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas . . . , the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty. . . . " 28 U.S.C. § 1333 provides that "[t]he district courts shall have original jurisdiction . . . of . . . [a]ny civil case of admiralty or maritime jurisdiction. . . . " 28 U.S.C. § 2680 (reproduced in full at App. 37) sets forth a list of exceptions to the federal government's exposure to potential tort liability.

## STATEMENT

In the fall of 1992, the United States Navy participated with the navies of several other NATO countries in a war games exercise on the high seas. In attempting to conduct a simulated attack on a Turkish ship (the TCG Muavenet), the missile crew of the USS Saratoga inadvertently fired two live Sea Sparrow missiles, killing and wounding many of the Muavenet's crew members. Petitioners, Turkish sailors and families asserting 299 personal injury claims and two wrongful death claims, sued the United States under the Public Vessels Act, 46 U.S.C.app. § 781, and the Death on the High Seas Act, 46 U.S.C.app. § 761. The district court had jurisdiction over the action under those statutes and under 28 U.S.C. § 1333.

The case was presented to the district court on a Stipulation of Fact (App. 39) establishing that "[t]he missile launch was not the result of any willful, intentional or deliberate misconduct" (¶ 7) but simply a tragic mistake. The mistake was easily avoidable. It "could have been prevented if a key watch stander, the Target Acquisition System operator, had been briefed that only a simulated exercise launch was intended" (¶ 16). It could also "have been prevented if watch standers within the Combat Direction Center had known the meaning of certain terms being used by the Fire Control Operator which indicated he intended to conduct a live firing" (¶ 17).

The district court granted the Government's motion for summary judgment, holding that the case presents a nonjusticiable political question: "Because any decision by the Court in this case would necessarily invade the province of Executive and Legislative Branches, it is clear that the Court should refrain from reviewing the incident in question." (App. 23, 925 F.Supp. at 737.) The court of appeals affirmed, holding:

> This case presents a nonjusticiable political question because it would require a court to interject itself into military decisionmaking and foreign policy, areas the Constitution has committed to coordinate branches of government. (App. 10, 105 F.3d at 1404.)

The court of appeals enumerated five factors in support of its conclusion: (1) the need for the judiciary to stay out of "sensitive foreign policy issues" such as "[t]he relationship between the United States and its allies;" (2) the

judiciary's lack of "standards," "knowledge," and "competence" to decide whether the Navy was negligent in this case; (3) the appropriateness of deferring to "military discretion" and "professional[ism];" (4) the desire to avoid "express[ing] a lack of respect for the political branches of government;" and (5) the belief that "judicial intrusion into military practices would impair the discipline that the courts have recognized as indispensable to military effectiveness." (App. 7-10, 105 F.3d at 1403-04.)

## REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's decision is an unwarranted judicial amendment to the Public Vessels Act. It conflicts with *Scheuer v. Rhodes*, 416 U.S. 232 (1974), with decisions of the Second, Ninth, and Tenth Circuits (and Missouri), and with the purposes of the political question doctrine. The Executive Branch is surrounded by statutory and court-made doctrines protecting it from inappropriate adjudication in situations like the present; it does not need the new protection the Eleventh Circuit has devised.

### I. The Court of Appeals' Decision Conflicts with *Scheuer v. Rhodes*.

In May 1970 the National Guard was called out to restore order on the campus of Kent State University. The infamous outcome was the wounding and killing of several students. In *Gilligan v. Morgan*, 413 U.S. 1, 7 (1973), this Court held that a suit for injunctive and declaratory

relief to prevent future such violations of students' constitutional rights presented a nonjusticiable political question, explaining that "[t]he relief sought by respondents . . . would . . . embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government." The Court cautioned that its holding did not embrace damages suits:

> In concluding that no justiciable controversy is presented, it should be clear that we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel, whether by way of damages or injunctive relief. (*Id.* at 11-12.)

In *Scheuer v. Rhodes*, 416 U.S. 232, 241, 249 (1974), a suit for damages for the deaths of three of the Kent State students came before the Court and was held fully justiciable, with the Court noting that "the public interest requires decisions and action to enforce laws for the protection of the public" and that "*Gilligan v. Morgan* by no means indicates a contrary result."

*Scheuer* and *Gilligan* stand for the principle that, while injunctive and declaratory relief may impermissibly intrude into executive and legislative prerogatives, damages suits ordinarily do not.[1] As Judge Calabresi recently explained:

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[1] The principle is venerable. See *Nixon v. Herndon*, 273 U.S. 536, 540 (1927) (Holmes, J., for the Court, stating: "That private damage may be caused by . . . political action and may be recovered for in a suit at law hardly has been doubted for over

> Injunctions and regulations tell people what they must do and what they must not do, and it is *these* types of intrusions that would entangle courts in military affairs. Tort judgments [for damages] do neither of these things. Of course, the military or other agencies of government may themselves decide to alter some forms of military behavior as a result of a damage award. But that decision, that interference, is *not* the court's. * * * The dynamics of that subsequent decision, moreover, hardly give rise to . . . prudential concerns regarding the constitutional separation of powers and the integrity of Article III courts. . . .

*Taber v. Maine*, 67 F.3d 1029, 1048 (2d Cir. 1995).[2] In extending the political question doctrine to protect the U.S. Navy from a damages suit, the court below placed itself in conflict with the *Gilligan-Scheuer* principle.

## II. The Decision Below Conflicts With Decisions of the Second, Ninth, and Tenth Circuits and of the State Courts of Missouri.

*Klinghoffer v. Palestine Liberation Organization*, 937 F.2d 44, 49 (2d Cir. 1991), held that a damages action against the PLO arising from the seizure of a cruise liner and murder of a passenger did not present a nonjusticiable

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two hundred years"); *O'Brien v. Brown*, 409 U.S. 1, 11 (1972) (Marshall, J., dissenting, quoting Justice Holmes with approval).

[2] Emphasis in original. The *Taber* opinion focused on the military's protection against adjudication that stems from *Feres v. United States*, 340 U.S. 135 (1950), rather than the political question doctrine as such. For present purposes the distinction is not material.

political question, relying in major part on the perception that "ordinary tort suit[s]" are routine judicial business; "the common law of tort provides clear and well-settled rules on which the district court can easily rely." *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 2524 (1996), reached the same decision respecting a damages action by the victims of governmental atrocities in Bosnia, relying on *Klinghoffer* for the proposition that "[t]he department to whom this issue has been 'constitutionally committed' is none other than our own – the Judiciary."[3] See also *Taber v. Maine, supra*. District courts in the Second Circuit have also indicated that ordinary tort damages actions do not fall within the political question doctrine as understood in that circuit.[4]

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[3] *Kadic*, 70 F.3d at 249, quoting *Klinghoffer*, 937 F.2d at 49. The internal quotation traces ultimately to *Baker v. Carr*, 369 U.S. 186, 217 (1962).

[4] See *Kim v. United States*, 887 F.Supp. 701, 708 (S.D.N.Y.), *vacated by consent order*, 903 F.Supp. 1546 (S.D.N.Y. 1995) (Public Vessels Act suit by Korean fishermen whose net was damaged by a joint U.S.-South Korean naval exercise; the court awarded damages and brushed aside a nonjusticiability defense by stating that "[n]o political question is presented by the circumstance of an American naval vessel damaging plaintiffs' property"); *DiLaura v. Power Authority*, 786 F.Supp. 241, 250 (W.D.N.Y. 1991), *aff'd*, 982 F.2d 73 (2d Cir. 1992) (indicating that an injunction action against a power plant raised political question concerns but that a damages suit did not). But *cf. Chaser Shipping Corp. v. United States*, 649 F.Supp. 736 (S.D.N.Y. 1986), *aff'd (table)*, 819 F.2d 1129 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988) (using the political question doctrine to dismiss an action by a marine insurer alleging monetary losses – subrogated property damage claims – resulting from the United States Government's mining of Corinto harbor in Nicaragua).

During the undeclared "tanker war" between Iran and Iraq in 1986, a United States warship (the USS Vincennes) mistook a civilian Iranian Airbus for an attacker and shot it down. In *Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992), *cert. denied*, 508 U.S. 960 (1993), the victims' damages suit was held justiciable:

> [B]ecause the plaintiffs seek only damages, the granting of relief will not draw the federal courts into conflict with the executive branch. Damage actions are particularly nonintrusive.
>
> * * *
>
> Damage actions are particularly judicially manageable. By contrast, because the framing of injunctive relief may require the courts to engage in the type of operational decision-making beyond their competence and constitutionally committed to other branches, such suits are far more likely to implicate political questions. Compare *Gilligan v. Morgan* [with] *Scheuer [v. Rhodes]*. . . .

*Koohi* seems absolutely indistinguishable from the present case.

*McKay v. United States*, 703 F.2d 464, 470 (10th Cir. 1983), rejected the Government's political question defense in a damages suit brought by the neighbors of a nuclear weapons factory, holding: "[T]he political question theory and the separation of powers doctrines do not ordinarily prevent individual tort recoveries."

In *Bennett v. Mallinckrodt, Inc.*, 698 S.W.2d 854, 864 (Mo.App. 1985), *cert. denied*, 476 U.S. 1176 (1986), workers at and near a radiopharmaceutical processing plant

sought damages for injuries from radioactivity. The highest state court in Missouri to have considered the point ruled the political question doctrine inapplicable, stating:

> The propriety of nuclear related activities is a political question properly committed to the legislative and executive branches of our government. Nonetheless, individual tort recoveries stemming from those activities normally are not precluded by the political question doctrine. [Actions for injunctive relief are distinguishable.] Plaintiffs in this case . . . are not trying to establish standards . . . ; they are seeking compensation for injuries. Nor does the allowing of recovery for those injuries . . . mean the state is creating new standards; rather, the state [court] is protecting its citizens by making defendant responsible for injuries arising from its activities as a cost of doing business.

All of the foregoing decisions directly exemplify the *Gilligan-Scheuer* principle that damages suits are normally not subject to the political question defense. There is additional evidence of widespread affirmance of the *Gilligan-Scheuer* principle in the decisions of other circuits,[5]

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[5] See *Industria Panificadora, S.A. v. United States*, 957 F.2d 886, 887 (D.C. Cir.), *cert. denied*, 506 U.S. 908 (1992) (implicitly questioning the applicability of the political question doctrine to an action by Panamanian businesses seeking damages for the United States Armed Forces' failure to prevent looting); *Eveland v. Director of C.I.A.*, 843 F.2d 46 (1st Cir. 1988) (rejecting a pro se plaintiff's eccentric and multifarious complaint against the C.I.A. in an opinion whose structure reflects the assumption that the political question doctrine does not apply to damages suits); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206-07 (D.C. Cir. 1985) (eschewing the political question doctrine as to the

including the Eleventh itself,[6] and – aside from the decision below – precious little authority to the contrary.[7]

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damages counts in a multiple-relief complaint addressing the United States' support of the Nicaraguan Contras); *cf. Coumou v. United States*, 107 F.3d 290 (5th Cir.), *on rehearing*, 114 F.3d 64, 65 (5th Cir. 1997) (rejecting an argument by the Coast Guard that its policy-driven decision to release a drug informant to the Haitian authorities was immune from judicial scrutiny by stating that "it still had a duty to exercise reasonable care in carrying out that policy").

[6] See *Couzado v. United States*, 105 F.3d 1389 (11th Cir. 1997) (upholding the award of damages against the United States for the results of an international "drug sting" operation); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir.), *cert. denied*, 117 S.Ct. 96 (1996) (upholding the award of damages against a former Ethiopian official who orchestrated a reign of terror in that country); *Linder v. Portocarrero*, 963 F.2d 332, 337 (11th Cir. 1992) (upholding the justiciability of a damages suit by victims of government-sponsored torture in Nicaragua and relying on *Klinghoffer, supra*, for the proposition that "an ordinary tort suit" for damages does not raise political question concerns); *O'Barry v. United States*, 915 F.Supp. 345 (S.D.Fla. 1995), *aff'd (table)* (11th Cir. 1997) (disposing of a damages suit arising from the U.S. Navy's explosion of a test bomb in international waters without any mention of the political question doctrine).

[7] In *Antolok v. United States*, 873 F.2d 369 (D.C. Cir. 1989), Judge Sentelle stated as an alternative holding that the political question doctrine barred an action for damages by Marshall Islanders harmed by nuclear testing. Neither Chief Judge Wald nor Judge Starr could go along with that reasoning. In *Tiffany v. United States*, 931 F.2d 271 (4th Cir. 1991), *cert. denied*, 502 U.S. 1030 (1992), the court used the discretionary function exception in the Federal Tort Claims Act, 28 U.S.C. § 2680(a), to dispose of a damages suit alleging the negligence of the North American Air Defense Command in intercepting and causing the crash of a private jet that invaded protected U.S. airspace without identifying itself. The opinion contains an approving discussion of the political question doctrine. District courts in *In Re Korean*

The decision below places the Eleventh Circuit in direct conflict with the Second, Ninth, and Tenth Circuits, and with Missouri, and it conflicts in principle with decisions of many other courts.

## III. In Situations Like the Present, the Executive Branch is Surrounded by Protections Against Inappropriate Adjudication and Does Not Need a New One.

When a U.S. Navy vessel causes an injury, the only potentially available forum is a bench trial in a United States District Court,[8] where the victim must surmount seven hurdles before being heard on the merits of the claim. (1) If he is a foreign national, the victim must meet the reciprocity condition set forth in the Public Vessels Act, 46 U.S.C.app. § 785, by showing that his government would permit a tort suit against it under similar circumstances.[9] (2) The court must be satisfied that the injured party does not come within the prohibition of *Feres v. United States*, 340 U.S. 135 (1950), against the adjudication

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*Air Lines Disaster*, 597 F.Supp. 613 (D.D.C. 1984), and *Rappenecker v. United States*, 509 F.Supp. 1024 (N.D.Cal. 1980), used the political question doctrine against portions of damages suits alleging (respectively) the United States' complicity in the Soviet's 1983 shooting down of a Korean jetliner and the Cambodian's seizure of the USS Mayaguez in 1975. In each case the court left portions of the plaintiffs' damages allegations intact. See also *Chaser, supra* note 4.

[8] The jurisdiction vested by the Public Vessels Act is exclusively in admiralty, where jury trial is unavailable. Maraist, Admiralty In A Nutshell 328-29 (3d ed. 1996).

[9] The Government concedes that the present plaintiffs have satisfied this condition. App. 44.

of tort claims by members of the Armed Forces injured while on duty.[10] (3) The case must be seen to fall outside the rather broad reach of the "discretionary function" exception to governmental liability set forth in 28 U.S.C. § 2680(a).[11] (4) The injury is not redressible if it arose "out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j).[12] (5) The victim must show that the claim did not "aris[e] in a foreign country." 28 U.S.C. § 2680(k).[13] (6) In situations of joint military activities among allies, the governing North Atlantic Treaty Organization Status of Forces Agreement ("NATO-SOFA") will typically anticipate some injuries and damage by having set up a dispute-resolution mechanism and "withdrawn [such

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[10] In the present case, the Government urged the *Feres* doctrine on both lower courts. The district judge initially ruled that *Feres* does not apply to members of another nation's armed forces (Order of July 28, 1995, App. 27), but suggested in passing in his political question decision that his thinking on *Feres* had shifted. App. 18, 925 F.Supp. at 735 n. 1. The Eleventh Circuit "decline[d] to address the applicability of *Feres* doctrine." App. 4, 105 F.3d at 1402 n. 1.

[11] 28 U.S.C. § 2680(a) (App. 37) is part of the Federal Tort Claims Act, which does not apply of its own force to maritime injuries such as the present case. However, most of the exceptions to governmental tort liability set forth in § 2680(a) have been judicially "read into" the Public Vessels Act. See *Maraist, supra* note 8, at 293-95. The Government did not raise the discretionary function defense in the present case.

[12] This "combatant activities" exception ultimately precluded the action in *Koohi, supra* Section II. In the present case, there was no war, just a war game.

[13] The present injuries occurred on the high seas.

claims] from the court's subject-matter jurisdiction." *Shafter v. United States*, 273 F.Supp. 152, 153 (S.D.N.Y. 1967), *aff'd*, 400 F.2d 584 (2d Cir. 1968), *cert. denied*, 393 U.S. 1086 (1969).[14] (7) In a broad range of cases, the Government can kill the lawsuit at the discovery stage by invoking the state secrets privilege against judicial inquiry into sensitive matters of foreign affairs, military strategies and tactics, and national security.[15]

These seven protections seem adequate to shield the Executive Branch from judicial intrusion. The Executive Branch does not legitimately need the eighth protection devised for it by the Eleventh Circuit in this case. In devising that protection, the Eleventh Circuit drained the life from an Act of Congress that has been quietly performing a useful and for the most part uncontroversial function – that of requiring the U.S. Navy to respect the legal rights of the rest of the maritime world – since 1920.

## IV. Engrafting the Political Question Doctrine Onto the Public Vessels Act Will Kill the Act.

In *Koohi, supra*, the Ninth Circuit pointed out that the federal courts have routinely "allowed damage actions

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[14] By its general terms, NATO-SOFA does not reach the high seas, and the supplemental Memorandum of Understanding governing the present case did not extend it.

[15] See *Black v. United States*, 62 F.3d 1115 (8th Cir. 1995), *cert. denied*, 116 S.Ct. 1541 (1996) (national security); *In Re United States*, 1 F.3d 1251, 1993 WL 262658 (Fed. Cir. 1993) (military secrets) (unreported decision); *Bareford v. General Dynamics Corp.*, 973 F.2d 1138 (5th Cir. 1992), *cert. denied*, 507 U.S. 1029 (1993) (design and operation of weapons system); *Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544 (2d Cir. 1991) (same).

alleging the negligent operation of [United States Navy] vessels." 976 F.2d at 1331.[16] Under the decision below, that would no longer be true. If the liability issue in the present case – in the words of the court below – involves such "a complex, subtle balancing of many technical and military considerations" that merits adjudication would constitute an impermissible "judicial intrusion into military practices,"[17] then it is hard to imagine an adjudicable case against the Navy.

In truth, the liability issue in the present case is about as simple and clear as a liability issue can get. The Stipulation of Fact (App. 39) is a virtual confession of negligence on the part of the Saratoga junior officers: the Government admits that these officers inadvertently omitted to tell the men firing the missiles that a simulation, not a live attack, was intended. Under a line of cases holding that it is self-evidently negligent – via the doctrine of *res ipsa loquitur* – to blow up a friendly ship[18] or otherwise inadvertently to sink one,[19] negligent conduct of the most obvious and mundane sort caused the injuries in the present case. In the words of the Stipulation of Fact, the destruction of the Muavenet resulted from a

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[16] In addition to the cases cited by the *Koohi* Court, see *Kim, supra* note 4; *O'Barry, supra* note 6.

[17] App. 8 and 10, 105 F.3d at 1404.

[18] *Continental Ins. Co. v. Harrison County,* 153 F.2d 671 (5th Cir. 1946) (dynamite); *Goodwin v. United States,* 141 F.Supp. 445 (E.D.N.C. 1956) (Marine Corps practice bomb).

[19] *Lone Star Industries v. Mays Towing Co.,* 927 F.2d 1453 (8th Cir. 1991) (unexplained fracture while barge in defendant's custody); *United States v. Baycon Industries,* 804 F.2d 630 (11th Cir. 1986) (unexplained sinking in good weather).

"failure to communicate clearly" (¶ 9). If the political question doctrine permits the Navy to exclude that kind of conduct from the operation of tort law, then hardly anything that is done or omitted on a Navy ship can successfully be called into question, and the Public Vessels Act will have moved a long way toward meaninglessness.

## CONCLUSION

The petition for a writ of certiorari should be granted. In view of the conflict of the decision below with this Court's decisions and with the Public Vessels Act, the Court may wish to consider summary reversal.

Respectfully submitted,

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# APPENDIX

**Ahmet AKTEPE, as personal representative of the estate of his son, Serkan Aktepe, deceased, Celal Kilinc, as personal representative of the estate of his son Mustafa Kilinc, deceased, Karim Aslan, Tayfun Balkan, Fahrettin Balkir, Mehmet Basal, Meftun Dirman, Necati Erol, Murat Gunes, Nizamettin Guz, Fazli Kesgun, et al., Plaintiffs-Appellants,**

**v.**

**USA, Defendant-Appellee.**

**No. 96-2167.**

United States Court of Appeals,
Eleventh Circuit.

Feb. 20, 1997.

Negligence suit was brought against the United States on behalf of members of crew of Turkish destroyer, and their survivors, seeking to recover for injuries and deaths which occurred when destroyer was struck by live missiles fired from American carrier during naval exercise. The United States District Court for the Middle District of Florida, No. 94-946-CIV-J-20, Harvey E. Schlesinger, J., granted government's motion for summary judgment, 925 F.Supp. 731, and plaintiffs appealed. The Court of Appeals, Black, Circuit Judge, held that action presented nonjusticiable political question.

Affirmed.

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Appeal from the United States District Court for the Middle District of Florida.

Before COX and BLACK, Circuit Judges, and FAY, Senior Circuit Judge.

BLACK, Circuit Judge:

Approximately 300 Turkish Navy sailors appeal the district court's order granting summary judgment in favor of the United States on their claims for death and personal injury suffered when two missiles fired from the USS SARATOGA (Saratoga) struck their vessel during North Atlantic Treaty Organization (NATO) training exercises. As this case presents a nonjusticiable political question, we affirm the district court's grant of summary judgment.

## I. *BACKGROUND*

The underlying facts are uncontested. During the fall of 1992, the United States, Turkey, and several other NATO members participated in "Exercise Display Determination 1992," a combined forces naval exercise under the overall command of Admiral J.M. Boorda of the United States Navy. The forces of participating nations were assigned to either of two multinational teams. Vice Admiral T. Joseph Lopez of the United States Navy led the "Brown Forces," which included the United States aircraft carrier Saratoga. The opposing "Green Forces," including the Turkish Destroyer TCG MUAVENET (Muavenet), were under the direct control of Admiral Kroon of the Netherlands.

During the "enhanced tactical" phase of the training exercises, the Brown Forces were to attempt an amphibious landing at Saros Bay, Turkey against the resistance offered by the Green Forces. Admiral Boorda ordered the units comprising each force to actively seek and "destroy" each other. Both task force commanders had

full authority to engage the enemy when and where they deemed appropriate and to use all warfare assets at their disposal to achieve victory. Needless to say, all confrontations were intended to be simulated attacks.

On October 1, 1992, the Combat Direction Center Officer aboard the Saratoga decided to launch a simulated attack on nearby opposition forces utilizing the Sea Sparrow missile system. After securing the approval of the Saratoga's Commanding Officer and the Battle Group Commander, the Combat Direction Center Officer implemented the simulated assault plan. Without providing prior notice, officers on the Saratoga woke the enlisted Sea Sparrow missile team and directed them to conduct the simulated attack. Certain members of the missile firing team were not told that the exercise was a drill, rather than an actual event.

As the drill progressed, the missile system operator used language to indicate he was preparing to fire a live missile, but due to the absence of standard terminology, the responsible officers failed to appreciate the significance of the terms used and the requests made. Specifically, the Target Acquisition System operator issued the command "arm and tune," terminology the console operators understood to require arming of the missiles in preparation for actual firing. The officers supervising the drill did not realize that "arm and tune" signified a live firing. As a result, the Saratoga inadvertently fired two live Sea Sparrow missiles at the Muavenet. Both missiles struck the Muavenet, resulting in several deaths and numerous injuries.

On September 29, 1994, some of the Turkish Navy sailors serving aboard the Muavenet instituted this action by suing the United States under the Public Vessels Act, 46 U.S.C.App. §§ 781-790, and the Death on the High Seas Act, 46 U.S.C.App. §§ 761-768. The present action encompasses 2 wrongful death claims and 299 personal injury claims arising out of the inadvertent missile firing. On September 22, 1995, the United States filed a motion for summary judgment, contending that this case presents a nonjusticiable political question. The district court granted the motion by order issued January 2, 1996.[1] On appeal, Appellants contend that the district court erred by dismissing its claims under the political question doctrine.

## II. *ANALYSIS*

The justiciability of a controversy depends not upon the existence of a federal statute, but upon whether judicial resolution of that controversy would be consonant with the separation of powers principles embodied in the Constitution. *See Dickson v. Ford*, 521 F.2d 234, 235 (5th Cir.), *cert. denied*, 424 U.S. 954, 96 S.Ct. 1428, 47 L.Ed.2d 360 (1975). Separation of powers is a doctrine to which the courts must adhere even in the absence of an explicit

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[1] Although the district court declined to reach the issue, the order granting summary judgment also suggested that dismissal probably would have been required under *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950). As we conclude that this case presents a nonjusticiable political question, we decline to address the applicability of *Feres* doctrine.

statutory command. *Tiffany v. United States*, 931 F.2d 271, 276 (4th Cir.1991), *cert. denied*, 502 U.S. 1030, 112 S.Ct. 867, 116 L.Ed.2d 773 (1992). Restrictions derived from the separation of powers doctrine prevent the judicial branch from deciding "political questions," controversies that revolve around policy choices and value determinations constitutionally committed for resolution to the legislative or executive branches. *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 230, 106 S.Ct. 2860, 2866, 92 L.Ed.2d 166 (1986); *Abebe-Jira v. Negewo*, 72 F.3d 844, 848 (11th Cir.), *cert. denied*, ___ U.S. ___, 117 S.Ct. 96, 136 L.Ed.2d 51 (1996).

In *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962), the Supreme Court identified six hallmarks of political questions, any one of which may carry a controversy beyond justiciable bounds:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] a lack of judicially discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

For invocation of the political question doctrine to be appropriate, at least one of these characteristics must be evident. *Id.* at 217, 82 S.Ct. at 710.

Foreign policy and military affairs figure prominently among the areas in which the political question doctrine has been implicated. The Supreme Court has declared that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292, 101 S.Ct. 2766, 2774, 69 L.Ed.2d 640 (1981). The Constitution commits the conduct of foreign affairs to the executive and legislative branches of government. *See, e.g., Oetjen v. Central Leather Co.*, 246 U.S. 297, 302, 38 S.Ct. 309, 311, 62 L.Ed. 726 (1918), *Dickson*, 521 F.2d at 236. At the same time, it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. *Baker*, 369 U.S. at 211, 82 S.Ct. at 707. Ultimately, whether a foreign relations controversy lies beyond judicial cognizance requires "discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in light of its nature and posture in the specific case, and the possible consequences of judicial action." *Id.*

In a related manner, the political branches of government are accorded a particularly high degree of deference in the area of military affairs. *Owens v. Brown*, 455 F.Supp. 291, 299 (D.D.C.1978). The Constitution emphatically confers authority over the military upon the executive and legislative branches of government. U.S. Const. art. I, § 8, cls. 11-16 (granting Congress the power to declare war and to provide for, organize, arm, maintain, and govern the military); U.S. Const. art. II, § 2 (providing the President shall be the Commander-in-Chief of the armed forces); *see also United States v. Stanley*, 483 U.S. 669, 682,

107 S.Ct. 3054, 3063, 97 L.Ed.2d 550 (1987) (noting the insistence with which the Constitution granted authority over the Army, Navy, and militia to the political branches). The Supreme Court has generally declined to reach the merits of cases requiring review of military decisions, particularly when those cases challenged the institutional functioning of the military in areas such as personnel, discipline, and training. *See, e.g., Chappell v. Wallace*, 462 U.S. 296, 304, 103 S.Ct. 2362, 2368, 76 L.Ed.2d 586 (1983) (concluding that unique disciplinary structure of the military establishment precluded enlisted military personnel from seeking to recover from their superior officers for alleged constitutional violations); *Gilligan v. Morgan*, 413 U.S. 1, 5-13, 93 S.Ct. 2440, 2443-47, 37 L.Ed.2d 407 (1973) (refusing to review and assert continuing regulatory control over the training of the Ohio National Guard); *Orloff v. Willoughby*, 345 U.S. 83, 90-92, 73 S.Ct. 534, 538-39, 97 L.Ed. 842 (1953) (holding that commissioning of officers in the Army was a matter of discretion within the province of the President).

As with many cases that directly implicate foreign relations and military affairs, the instant controversy raises a nonjusticiable political question. This suit exhibits most, if not all, of the indicia of political questions identified by the Supreme Court in *Baker v. Carr*. First, the Constitution commits the issues raised by this action to the political branches of government. The underlying events involve two nations engaged in a NATO training exercise. The relationship between the United States and its allies, like the broader question of which nations we number among our allies, is a matter of foreign policy. As courts are unschooled in "the delicacies

of diplomatic negotiation [and] the inevitable bargaining for the best solution of an international conflict," the Constitution entrusts resolution of sensitive foreign policy issues to the political branches of government. *See Smith v. Reagan*, 844 F.2d 195, 199 (4th Cir.) (quoting *Holtzman v. Schlesinger*, 484 F.2d 1307, 1312 (2d Cir.1973), *cert. denied*, 416 U.S. 936, 94 S.Ct. 1935, 40 L.Ed.2d 286 (1974)), *cert. denied*, 488 U.S. 954, 109 S.Ct. 390, 102 L.Ed.2d 379 (1988). Similarly, the Constitution reserves to the legislative and executive branches responsibility for developing military training procedures that will ensure the combat effectiveness of our fighting forces. *See Gilligan*, 413 U.S. at 5-13, 93 S.Ct. at 2443-47; *Nation Magazine v. United States Dep't of Defense*, 762 F.Supp. 1558, 1567 (S.D.N.Y.1991).

Second, no judicially discoverable and manageable standards exist for resolving the questions raised by this suit. In order to determine whether the Navy conducted the missile firing drill in a negligent manner, a court would have to determine how a reasonable military force would have conducted the drill. As the Supreme Court noted in a related context, "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan*, 413 U.S. at 10, 93 S.Ct. at 2446. Decisions relative to training result from a complex, subtle balancing of many technical and military considerations, including the trade-off between safety and greater combat effectiveness. *See Boyle v. United Technologies Corp.*, 487 U.S. 500, 511, 108 S.Ct. 2510, 2518, 101 L.Ed.2d 442 (1988). Courts will often be without knowledge of the facts or standards necessary to assess the wisdom of the balance struck. *Rappenecker v. United States*, 509 F.Supp.

1024, 1029 (N.D.Cal.1980). More particularly, courts lack standards with which to assess whether reasonable care was taken to achieve military objectives while minimizing injury and loss of life. *See DaCosta v. Laird*, 471 F.2d 1146, 1155 (2d Cir.1973); *Rappenecker*, 509 F.Supp. at 1030.

Third, resolving this case inevitably would require that courts make initial policy decisions of a kind appropriately reserved for military discretion. For example, a court could not conclude that the Navy behaved negligently when it declined to advise each member of the Sea Sparrow missile team that the firing was a drill without rendering a policy determination regarding the necessity of simulating actual battle conditions. Trained professionals, subject to the day-to-day control of the responsible civilian authorities, necessarily must make comparative judgments on the merits as to evolving methods of training, equipping, and controlling military forces with respect to their duties under the Constitution. *Gilligan*, 413 U.S. at 8, 93 S.Ct. at 2444-45. It would be inappropriate for a district court to undertake this responsibility in the unlikely event that it possessed the requisite technical competence to do so. *Id.* at 8, 93 S.Ct. at 2445.

Fourth, adjudicating this case would express a lack of respect for the political branches of government by subjecting their discretionary military and foreign policy decisions to judicial scrutiny, notwithstanding the judiciary's relative lack of expertise in these areas. The interjection of tort law into the realms of foreign policy and military affairs would effectively permit judicial reappraisal of judgments the Constitution has committed to the other branches. *Tiffany*, 931 F.2d at 278.

Appellants' effort to cast their suit as a common negligence action directed at lower-level military operatives is unconvincing. The allegations of the complaint launch a far more sweeping assault on the Navy's practices than Appellants acknowledge. The complaint alleges negligence relating to Navy communication, training, and drill procedures. Moreover, even if the complaint actually targeted only operational level personnel, that fact would not eliminate the justiciability problem. The court would still have to decide how the weapon system operator should have behaved. In the present context, such an inquiry might require the judiciary to determine whether members of the Sea Sparrow missile team should have demanded confirmation of their superior's apparent instruction to fire a live missile. Such judicial intrusion into military practices would impair the discipline that the courts have recognized as indispensable to military effectiveness. *See, e.g., Chappell,* 462 U.S. at 300, 103 S.Ct. at 2365-66 (noting that "the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection").

## III. *CONCLUSION*

This case presents a nonjusticiable political question because it would require a court to interject itself into military decisionmaking and foreign policy, areas the Constitution has committed to coordinate branches of government.

AFFIRMED.

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**JACKSONVILLE DIVISION**

AHMET AKETEPE, ET. AL.,

Plaintiffs,

v.

UNITED STATES OF AMERICA

Defendant.

Case No.
94-946-Civ-J-20

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**ORDER**

(Filed Jan. 2, 1996)

Before the Court are the following motions:

(1) Defendant's Motion for Summary Judgment (Doc. No. 37, filed September 22, 1995);

(2) Plaintiffs' Motion for Summary Judgment on Liability (Doc. No. 39, filed September 25, 1995);

(3) Defendant's Motion to Strike Witnesses' Affidavit (Doc. No. 43, filed October 13, 1995).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing the Court, by reference to materials on file that there are no genuine issues of material fact that should be decided at trial. *Cheilitis Corp. v. Citrate*, 477 U.S. 317 (1986); *Clark v. Coats & Clark, Inc.*, 929

F.2d 604 (11th Cir. 1991). A moving party discharges its burden on a motion for summary judgment by "showing" or "pointing out" to the Court that there is an absence of evidence to support the non-moving party's case. *Cheilitis*, 477 U.S. at 325. Rule 56 permits the moving party to discharge its burden with or without supporting affidavits and to move for summary judgment on the case as a whole or on any claim. *Id.* When a moving party has discharged its burden, the nonmoving party must then "go beyond the pleadings," and by its own affidavits, or by "depositions, answers to interrogatories, and admissions on file," designate specific facts showing that there is a genuine issue for trial. *Id.* at 324.

In determining whether the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law, the Court must draw inferences from the evidence in the light most favorable to the nonmovant, *Key West Harbor v. City of Key West*, 987 F.2d 723, 726 (11th Cir. 1993), and resolve all reasonable doubts in that party's favor, *Spence v. Zimmerman*, 873 F.2d 256, 257 (11th Cir. 1989). The nonmovant need not be given the benefit of every inference, but only of every "reasonable" inference. *Brown v. City of Clewiston*, 848 F.2d 1534, 1540 n.12 (11th Cir. 1988). The Eleventh Circuit has explained the reasonableness standard:

> In deciding whether an inference is reasonable, the Court must "cull the universe of possible inferences from the facts established by weighing each against the abstract standard of reasonableness." [citation omitted]. The opposing party's inferences need not be more probable

> than those inferences in favor of the movant to create a factual dispute, so long as they reasonably may be drawn from the facts. When more than one inference reasonably can be drawn, it is for the trier of fact to determine the proper one.

*WSB-TV v. Lee*, 842 F.2d 1266, 1270 (11th Cir. 1988).

Thus, if a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, then the court should not grant the summary judgment motion. *Augusta Iron and Steel Works v. Employers Insurance of Wausau*, 835 F.2d 855, 856 (11th Cir. 1988). It must be emphasized that the mere existence of *some* alleged factual dispute will not defeat an otherwise properly supported summary judgement motion. Rather, "the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is "genuine" if the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

In the case at hand, the parties filed a Joint Pretrial Stipulation which contained a "Statement of Agreed Facts" (Doc. No. 45, filed October 27, 1995). Thus, no genuine issues of material fact reamin [sic] to be resolved and this case is ripe for summary judgment as a matter of law.

## FACTS

From September 25, 1992, through October 8, 1992, the navies of several North Atlantic Treaty Organization ("NATO") countries, including Turkey and the United States of America, were involved in the combined forces naval exercise, "Exercise Display Determination 1992" ("DD-92"). Admiral J.M. Boorda, United States Navy, Commander in Chief, Allied Forces Southern Europe, was the Commander in charge of all NATO forces participating in DD-92.

For the exercise to simulate wartime encounters between opposing powers, the participants were divided into two opposing forces, the Brown forces and the Green forces. Turkish and American warships, as well as those of other NATO countries, were assigned to both the Brown forces and the Green forces. Vice Admiral T. Joseph Lopez, USN, was in command of the Brown forces. Admiral Kroon, Netherlands, was in charge of the Green forces. The U.S. Navy aircraft carrier USS SARATOGA (CV-60) ("Saratoga") was assigned to the Brown forces; the Turkish Destroyer TCG MUAVENET (DM 357) ("Muavenet") was assigned to the Green forces.

For the "enhanced tactical" or battle problem phase of DD-92, the Brown forces were to attempt an amphibious landing at Saros Bay, Turkey, while the Green forces were to stop and destroy the Brown forces. Admiral Boorda's orders were for the units comprising the Brown and Green forces to actively seek and destroy each other. Both task force commanders had full authority to engage the enemy when and where they judged appropriate

using all warfare assets to achieve victory. Of course, all attacks were supposed to be simulated attacks.

On October 2, 1992, during the enhanced tactical phase [of DD-92] the Saratoga fired two live Sea Sparrow missiles at the Muavenet. Both of said missiles physically impacted, in whole or in part, the Muavenet. The missile launch was not the result of any willful, intentional or deliberate misconduct. The missile launch was not the result of any equipment or system failure.

The lack of uniform terminology, i.e., the imprecise use of terminology, used by Saratoga personnel involved in the missile firing, caused a misunderstanding which occasioned the actual firing of the missiles. The failure to communicate clearly and in standard terminology was caused by the lack of a Navy standardized training and qualification process for Tactical Action Officers (TAO) and Ship's Weapons Coordinators (SWC) on board the Saratoga. The missile launch occurred during a drill aboard the Saratoga in which the Sea Sparrow system was to be utilized to simulate attacks on nearby ships participating in the ongoing NATO exercise.

Rear Admiral Dur, the Battle Group Commander and the Composite Warfare Commander for the Brown forces embarked on the Saratoga during DD-92. He approved the Saratoga's Combat Direction Center Officer's (CDCO) plan to conduct the simulated missile firing drill approximately 25 minutes before it was to occur. The actual procedures for conducting a simulated attack are always the responsibility of the Commanding Officer of each vessel. Thus, the missile firing was internal to the Saratoga.

The enlisted Sea Sparrow team aboard the Saratoga did not have advance notice of this drill prior to the time they were awakened on the evening of October 1, 1992, to conduct the drill. Certain Saratoga personnel involved in the missile firing were not affirmatively made aware that the exercise was a drill, a simulation, not an actual event. The officers running the drill failed to understand the significance of terms and requests made by the Missile Fire Control System operator which included communications that the missile crew was preparing for an actual live missile launch. There were no Navy standard procedures and regulations in existence at the time of the missile firing applicable to the drill which resulted in the missile launches. For example, they were not required to repeat announcements of "THIS IS A DRILL" or similar words.

The live missile launches could have been prevented if a key watch stander, the Target Acquisition System operator, had been briefed that only a simulation exercise launch was intended. The live missile launches could have been prevented if watch standers within the combat Direction Center (CDC) had known the meaning of certain terms being used by the fire Control Operator which indicated he intended to conduct a live firing. The Target Acquisition System (TAS) operator did not confirm with any officer in the Combat Direction Center (CDC) his belief that a live firing was intended. Saratoga TAS console operators understood the term "arm and tune" to require the actual arming of the missiles in preparation for a real firing. Neither the TAO nor the SWC appreciated the significance of this terminology. The term "arm and tune" was used once by the TAS operator in the drill

during which the live missiles were launched on October 1, 1992.

This case was filed on behalf of members of the crew of the Muavenet, and their survivors, who allegedly suffered injuries and/or loss of property and/or death as a result of the accidental destruction of part of that vessel by the two live Sea Sparrow missiles which were fired from the Saratoga during DD-92. In their Complaint Plaintiffs allege that their damages were caused by the following acts of negligence:

> 1. The negligent absence of adequate communication among personnel associated with the operation of the Sea Sparrow System;
>
> 2. The negligent last minute decision by SARATOGA Operational Watch Officers to conduct an ad hoc drill using Sea Sparrow System to simulate attacks on nearby ships participating in the ongoing NATO exercise;
>
> 3. The Watch Officers' negligent decision to awaken the enlisted Sea Sparrow team to participate in the no-notice drill;
>
> 4. The negligent failure to advise the oncoming missile system's operators that what was contemplated was a drill, a simulation, and not an actual event;
>
> 5. The negligent failure of the officers running the drill to understand the significance of terms and requests made by the missile fire control system operator which indicated that the missile crew was preparing for an actual missile launch; and
>
> 6. Other incidents of negligence to be shown at the trial hereof.

Plaintiffs' Complaint at ¶ 9.

On April 11, 1995, Defendant filed a Motion to Dismiss which argued that this case should be dismissed because the claims were barred by the *Feres* doctrine. *See Feres v. United States*, 340 U.S. 135, 146 (1950). This Court denied that motion because Defendant failed to show, at that time, that the underlying rationales of *Feres* militated against allowing this action to proceed. *See Elliot by and through Elliot v. United States*, 13 F.3d 1555, 1560 (11th Cir. 1994).[1] After filing a motion for reconsideration (Doc. No. 30), which this Court denied (Doc. No. 35), Defendant filed the motion for summary judgement (Doc. No. 37) which is currently pending before the Court.

## SUMMARY OF THE ARGUMENTS

In its Motion for Summary Judgment, Defendant argues that this case presents a political question which

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[1] These policy justifications include: (1) the "distinctly federal" relationship between the United States and its military personnel; (2) the presence of an alternative source of compensation; and (3) the fear of disrupting the military disciplinary structure. *See Stencel Aero Eng. Corp. v. United States*, 431 U.S. 666, 671-72 (1977). Defendant's motion was denied because it failed to show that Plaintiffs were under the supervision of an American superior – a fact which the parties now stipulate – and it failed to show that there was an alternative source of compensation available to Plaintiffs. Because this Court has determined that the issues raised by Plaintiffs' complaint raised political questions which are nonjusticiable, the application of the *Feres* doctrine need not be reexamined, although it is likely that this case would be dismissed on that basis in light of the additional information which has been provided since Defendant's motion to dismiss was denied.

can not be resolved by the Court. According to Defendant, the issues raised by Plaintiff would necessarily require the Court to invade the province of the executive and legislative branches because the Court would be forced to review the training procedures utilized by the Navy during DD-92 in order to impose liability on Defendant. Defendant contends that this case is really a friendly-fire case involving only military personnel rather than a case in which civilians were harmed by members of the military.

Plaintiffs contend that this case does not present a political question, but instead is a simple negligence action in which the Court need only determine whether the lapse in communication which occurred on the Saratoga constituted culpable negligence. According to Plaintiffs, this suit is akin to a suit by civilians to recover for damages which they incur as a result of actions by the military, and such suits have been ruled justiciable. *See Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992) *cert. denied*, 113 S.Ct. 2928 (1993) (holding that the accidental shooting down of an Iranian airbus by the U.S.S. VINCENNES presented a justiciable controversy); *Peterson v. United States*, 673 F.2d 237 (8th Cir. 1982) (holding that damages resulting from a sonic boom produced by a low-flying military aircraft presented a justiciable controversy); and *Ward v. United States*, 471 F.2d 667 (3d Cir. 1973) (same). Thus, Plaintiffs contend, the Court should not dismiss this action.

## DISCUSSION

In *Baker v. Carr*, 369 U.S. 186, 217 (1962), the United States Supreme Court delineated six factors which it considered indicative of political questions:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or
>
> [2] a lack of judicially discoverable and manageable standards for resolving it; or
>
> [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
>
> [4] the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or
>
> [5] an unusual need for unquestioning adherence to a political question already made; or
>
> [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*See also United States v. Munoz-Flores*, 495 U.S. 385, 389-90 (1990).

Generally, all cases involving foreign affairs potentially raise nonjusticiable political questions. *See, e.g. Oetjen v. Central Leather Co.*, 246 U.S. 297 (1917) (stating that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative – 'the political' – Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision"). Likewise, military training is an

area generally outside the scope judicial review. *See Gilligan v. Morgan*, 413 U.S. 1, 8 (1972). However, as was noted in *Baker v. Carr*, 369 U.S. at 211, it would be "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." The determination of whether a case raises a political question depends upon "a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action." *Id.*

Thus, when deciding whether a political question is involved, a court must closely examine the particular issues presented in the case. *Id.* The Court must carefully consider the extent to which this case involves basic policy decisions entrusted solely to the executive in discharge of its Constitutional role. Executive action that only indirectly gives content to some foreign policy issue is not outside the scope of review. Judicial review is only prohibited "[i]n the narrow band of governmental action where foreign policy interests are direct and substantial." *Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974). Therefore, "[i]ssues which are not at base sweeping challenges to the Executive's foreign policy typically are adjudicated by the courts because they do not involve judicial usurpation of the Executive's constitutional powers to manage foreign affairs." *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1512 (D.C.Cir. 1984) (en banc) *vacated on other grounds*, 471 U.S. 1113 (1985).

As was noted by Plaintiffs, the federal courts have previously allowed damages actions in which the negligence of the armed forces is alleged to be the cause of personal injury, death, and/or the destruction of personal property. *See Koohi v. United States*, 976 F.2d at 1331; *Peterson v. United States*, 673 F.2d 237 (8th Cir. 1982); *Ward v. United States*, 471 F.2d 667 (3d Cir. 1973). Furthermore, when the Plaintiffs are only seeking money damages, the courts have been willing to permit such cases to go forward. *See Scheur v. Rhodes*, 416 U.S. 232, 247-249 (1974) (permitting a suit against the National Guard for its activities relating to the Kent State shootings to proceed). However, the courts have never confronted the issue of whether the courts can consider an action for damages filed by participants in joint military training operations who are injured as a result of the actions of other participants, or so called friendly-fire incidents.[2]

In an effort to invoke the protection of *Koohi*, *Peterson*, and *Ward*, Plaintiffs attempt to classify themselves as civilians rather than as members of the armed services. Plaintiffs' characterization is, however, less than accurate. The Plaintiffs in this case were members of the Turkish Navy who, as an incident of their service, participated in

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[2] As can be expected, most friendly fire cases are disposed of because of the application of the *Feres* doctrine. The case at bar is unique in that it does not involve injury to American service members. However, the principle behind *Feres*, that a service member should be precluded from suing the government for injuries suffered as a result of actions by a fellow service member, should apply with equal force in this case.

military exercises in which they were under the supervision of an American supervisor, Admiral J.M. Boorda. Thus, although the Plaintiffs here were actually part of another country's armed forces, they should be treated as though they were serving within the Executive Branch for the purpose of determining whether the Court should refrain from deciding this case. *See Daberkow v. United States*, 581 F.2d 785, 788 (9th Cir. 1978) (holding that "[t]he relationship between a foreign soldier engaged in joint military activities and his American superiors is similar to the relationship of an American soldier to an American superior; military discipline could be disrupted just as much by a foreign serviceman's lawsuit as by an American's").[3] Because any decision by the Court in this case would necessarily invade the province of Executive and Legislative Branches, it is clear that the Court should refrain from reviewing the incident in question.[4]

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[3] In *Daberkow*, the Court applied the *Feres* doctrine and dismissed the case. Although *Feres* would provide this Court with an alternative basis for dismissing this case in light of the *ex gratia* payments made by the United States and the existence of an alternative source of compensation – those benefits described in Exhibit B to Defendant's Motion for Summary Judgment (Doc. No. 38) – the Court need not address that basis for dismissal. The fact that this type of lawsuit would disrupt the relationship between a soldier and his or her superiors, would require this Court to dictate how training exercises were to be conducted and would require this Court to undermine the Executive Branch's attempts to settle this case through diplomatic means is sufficient to justify this Court's decision.

[4] *See also Bentzlin v. Hughes Aircraft Co.*, 833 F.Supp. 1486 (C.D.Cal. 1993), stating that "civilians injured at the hands of the military do not raise political questions; soldiers injured at the hands of the military raise political questions. The

As support for this Court's decision to refrain from deciding the issues presented by this case, one need look no further than Plaintiffs' Complaint and the parties' stipulation of fact. In Plaintiffs' Complaint, Plaintiffs allege that Defendant was negligent in failing to communicate that the attack was to be a simulation, failing to use or understand particular terms and by forcing the enlisted Sea Sparrow team to participate in an early morning, no-notice drill. In the joint stipulation, the parties agree that the Sea Sparrow missiles were launched as a result of lapse in communications between those who knew the attack on the Muavenet was to be a simulation and those who did not know, but who had the ability to control the use of live ammunition. In essence, Plaintiffs' claims can be summarized as follows: Nobody told the Saratoga missile crew that the attack was to be drill rather than actual combat. *See* Plaintiffs' Response (Doc. No. 42). The question remains, however, whether those persons should have known it was a drill.

In matters such as military training and exercises, it is best that the Court refrain from imposing its views of what is reasonable on the Executive and Legislative branches. Simply put, the Court is not qualified to make

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relationship between soldiers and the military is indubitably within the province of the Executive. Indeed, the Supreme Court has recognized that '[t]he complex subtle, and professional decisions as to the composition, training, equipping and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.' *Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S.Ct. 2440, 2446, 37 L.Ed.2d 407 (1973)").

the determination of whether it was reasonable for the Navy to act in the manner in which it did, because the Court can not determine what level of information would be required to render the drill safe while at the same time retaining its usefulness as an accurate reflection of the Navy's preparedness for battle. Those persons in the other branches are better suited to make the determination of who should know that an exercise is a drill because they are better suited to determine whether drill conditions adequately reflect the actual events.

Additionally, Defendant has attempted through diplomatic means to compensate Plaintiffs for their losses by making *ex gratia* payments to the Turkish government. Permitting this suit to proceed would frustrate the Executive Branch's attempts to resolve this case in a manner which is satisfactory to both the Executive and the Turkish government, because the Court would be forced to determine what reasonable compensation would be rather than permitting the two governments to reach a mutually agreeable settlement.

Accordingly, the Court will refrain from deciding this case because the training of the armed forces has been committed to the care of the Executive Branch, no judicially discoverable and manageable standards exist for resolving the issue of whether the Government's actions were reasonable in this case, the decision would require the Court to make a policy determination regarding the proper method of preparing sailors for battle situations, and would require this Court to settle a dispute which would better be resolved through diplomatic means. Defendant's Motion for Summary Judgment (Doc. No. 37) is **GRANTED**. Plaintiffs' Motion for Summary Judgment

(Doc. No. 39) is **DENIED**. Defendant's Motion to Strike Witnesses (Doc. No. 43) is **MOOT**.

The Clerk shall enter judgment in favor of Defendant and against Plaintiffs and shall close the file.

**DONE AND ORDERED** at Jacksonville, Florida, this 2nd day of January, 1996.

/s/ Harvey E. Schlesinger
HARVEY E. SCHLESINGER
United States District Judge

Copies To:

G.J. Rod Sullivan, Esq.
David V. Hutchinson, Esq.

Garry Randolph, Deputy Clerk
Law Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

AHMET AKETEPE, ET. AL.,

Plaintiffs,

v.

UNITED STATES OF AMERICA

Defendant.

Case No.
94-946-Civ-J-20

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**ORDER**

(Filed Jul. 31, 1995)

Before the Court is Defendant's Motion to Dismiss (Doc. No. 12, filed April 11, 1995). Plaintiffs filed a Response in Opposition on May 30, 1995 (Doc. No. 24).

In deciding a motion to dismiss, the district court is required to view the complaint in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). A complaint should not be dismissed for failure to state a cause of action "unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991).

The Federal Rules of Procedure "do not require a claimant to set out in detail the facts upon which he bases his claim." *Conley*, 355 U.S. at 47. All that is required is "a short and plain statement of the claim." Fed. R. Civ. P. 8(a)(2). The Federal Rules have adopted this "simplified

pleading" approach because of "the liberal opportunity for discovery and other pretrial procedures . . . to disclose more precisely the basis of both claim and defense. . . . " *Id.* at 48. The purpose of notice pleading is to reach a decision on the merits and to avoid turning pleading into "a game of skill in which one misstep by counsel may be decisive to the outcome." *Id.*

In its Motion to Dismiss, Defendant argues that this case should be dismissed because of the application of *Feres v. United States,* 340 U.S. 135 (1950). According to Defendant, Plaintiffs are not entitled to recover for the injuries they allegedly suffered because these injuries occurred while Plaintiffs were in the course of activities incident to military service. *Id.* at 146. Plaintiffs contend that the *Feres* doctrine does not bar the claim of foreign service members who are injured as a result of the negligence of the United States.

In order to determine whether the *Feres* doctrine would bar recovery by these Plaintiffs, the Court must consider, among other factors, whether civil lawsuits of this type will have an adverse impact on the military disciplinary structure. *See Elliott by and Through Elliott v. United States,* 13 F.3d 1555 (11th Cir. 1994). Unlike other cases which invoke the *Feres* doctrine, this case does not involve the situation in which the plaintiff is questioning the reasonableness of actions taken by his or her superior officer, but instead involves the situation in which Plaintiffs question the actions of a third party who was participating with them in a training exercise.

While it is true that the courts have extended the *Feres* doctrine to situations in which a foreign serviceman

was injured by actions taken by his American superiors, *See Daberkow v. United States*, 581 F.2d 785 (9th Cir. 1978), the Court is not convinced that this rule should apply with equal force when the injuries are the result of actions taken by persons in non-supervisory roles. In *Daberkow*, the Plaintiff was a foreign service member who was preforming duties incident to a joint military operation in which he was under the direct supervision of an American supervisor. The Court ruled that a suit based on the actions taken by his American supervisor would result in the same interference with military discipline as an action by an American service member against his American supervisors. *Id.* at 788. Because this case does not involve a service member suing his or her superiors for damages which allegedly resulted from discretionary decisions or actions taken during the course of military activities, Defendant is not entitled to the protection provided by the *Feres* doctrine.

Additionally, Defendant's claim that "it is believed that all injured Turkish service members received medical treatment" and that it is "believed that the Turkish military compensation scheme allows for disability pensions for service members" is insufficient to resolve the issue of whether substitute compensation is available to Plaintiffs. Because Defendant bears the burden of demonstrating that the underlying rationales of *Feres* militate against allowing an action to proceed, *See Elliott*, 13 F.3d at 1560, and since Defendant has failed to establish that Plaintiffs are entitled to compensation from an alternative source, Defendant is not entitled to dismissal of this case.

With respect to Plaintiffs' claims of negligent infliction of emotional distress, Defendant claims that Plaintiffs are not entitled to recovery because they did not experience a physical impact or injury. Plaintiffs claim that they need only show that they were within the "zone of danger" to recover damages for negligent infliction of emotional distress. Without deciding the legal question of whether Plaintiff must show an impact or injury in order to recover for emotional distress, the Court finds that the allegations in the Complaint, when viewed in a light most favorable to Plaintiffs, are sufficient to state a claim that the Plaintiffs did experience a physical impact which would, if proven, support a claim for negligent infliction of emotional distress.

Because Defendant has failed to show that the *Feres* doctrine militates against permitting this action to go forward, Defendant's Motion to Dismiss (Doc. No. 12) is **DENIED.**

**DONE AND ORDERED** at Jacksonville, Florida, this 28th day of July, 1995.

/s/ Harvey E. Schlesinger
HARVEY E. SCHLESINGER
United States District Judge

Copies To:

G.J. Rod Sullivan, Esq.
David V. Hutchinson, Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 96-2167

---

HAMET AKTEPE, as personal representative of the estate of his son, Serkan Aktepe, deceased, CELAL KILINC, as personal representative of the estate of his son Mustafa Kilinc, deceased, KARIM ASLAN, TAYFUN BALKAN, FAHRETTIN BALKIR, MEHMET BASAL, MEFTUN DIRMAN, NECATI EROL, MURAT GUNES, NIZAMETTIN GUZ, FAZLI KESGUN, et al.,

Plaintiffs-Appellants,

versus

USA

Defendant-Appellee.

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On Appeal from the United States District Court for the Middle District of Florida

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(Filed May 28, 1997)

ON PETITION(S) FOR REHEARING
AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion ___, 11th Cir., 19___, ___ F.2d ___).

Before: COX and BLACK, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

**UNITED STATES DISTRICT COURT**

MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

AHMET AKETEPE, et al.,

V.

UNITED STATES OF AMERICA,

**JUDGMENT IN A CIVIL CASE**

**CASE NUMBER:**
94-946-Civ-J-20

(Filed Jan. 3, 1996)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

**IT IS ORDERED AND ADJUDGED**

Pursuant to the Court's order issued this date, judgment is hereby entered in favor of the Defendant and against Plaintiff.

January 3, 1996
*Date*
counsel notified

RICHARD D. SLETTEN
*Clerk*

/s/ Jamie S. Fisher
*(By) Deputy Clerk*

## LIST OF 302 PARTIES

Mesut Acar, Ilker Agus, Cavit Akan, Ismail Akan, Yavuz Selim Akdolun, Ufuk Akkaya, Ozden Akkus, Ahmet Aktepe, as Personal Representative of the Estate of his son, Serkan Aktepe, deceased, Fatih A. Aktolga, Ibrahim Akyurek, Huseyin Alagoz, Mehmet Alar, Selami Alptekin, Ahmet Altay, Huseyin Altay, A. Ibsan Altinbay, Hasan Altug, Poyraz Anar, Selim Arac, Hasan Huseyin Arslan, Mutlu Arslan, Beytullah Asik, Ahmet Aslan, Kerim Aslan, Murat Aslan, Husnu Asmaz, Ali Asnuk, Cuma Atan, Kemal Ates, Ayhan Atici, Sayan Avci, Faruk Avlar, Umit Ayan, Okkas Fikret Aybek, Esdal Aydemir, Cemalettin Aydin, Hasan Aykin, Isak Aydin, Selahattin Aydos, Halit Aygun, Behram Aytekin, Mustafa Ayvaz, Mehmet Bal, Isak Balci, Bilal Balcioglu, Tayfun Balkan, Fahrettin Balkir, Bulent Balli, Yasar Bas, Mehmet Basal, Hulusi Baskurt, Bahattin Batbay, Burhan Baydar, Ilhan Bayram, Metin Bayram, Bayram Baysal, Huseyin Berk, Salih Beyaz, Ebubekir Beydogan, Kaya Bilen, Erol Bilgic, A. Sinan Bilgir, Senel Boylu, Muharram Bozkurt, Ubbet Bozkurt, Atilla Bulut, M. Sah Burak, Veli Caglar, Serafettin Cakici, Abdurrahman Cakir, Erhan Cakir, Talip Cakmak, Burhanettin Can, Ismail Can, A. Tuncay Caner, Tuna Cavusoglu, Metin Cekci, Yildirim Suleyman Celik, Celal Cevic, Firat Ceylan, Dursun Cicek, Fikri Ciftci, Suleyman Ciftci, Huseyin Cinar, Kubilay Cinar, Necati Alper Cinar, Omer Ciraci, Mehmet Cirak, Fuat Civek, Nadi Comert, Atilla Coskun, Baki Coskun, Gazi Dag, Necati Dagdeviren, Bekir Demir, Kadri Demir, Saban Demir, Ismail Demirkol, Huseyin Dik, Osman Dilmen, Meftun Dirman, Selman Dogan, Husein Donmez, Mustafa Duman, Kasim Durak, D. Arda Duran, Orhan Duran, Mustafa Durmaz, Emin Efe, S. Devrim Ekal, Mazhar Ekin, Mehmet Ekinci, Mustafa Ekinci, Nazmi Ekinci, Hayri Ekiz, Faruk Emir, Erol Erdas, Huseyin Erdem, Mustafa Erdem, Kenan Erdemir, Hasan Erdogan, Mehmet Erdogan, Sinasi Erdogan, Sabahattin Ergin, Tolga Erkan, Bayram Ali

Erken, Gurkan Erken, M. Necati Erol, Ali Ertas, Nadir Eryildiz, Altay Eskici, Murat Firat, Ahmet Gedik, Ustun Gokcen, Davut Gokyildiz, Abdullah Gul, Ismail Gumus, Salih Gumus, Sehmuz Gumus, Selahattin Gunay, Gazanfer Gunce, Cesim Gundogdu, Levent Gunes, Murat Gunes, Hamit Gurlek, Mizamettin Guz, Abdullah Haccak, Muhsin Imamoglu, Nevzat Ince, Kamil Inci, Enver Isik, Nurullah Kabakli, Mehmet Kalay, Mehmet Nur Kalayci, Senol Kaleoglu, Haim Kantar, Yalcin Kap, Aptullah Karaca, Emin Karaca, Nidal Karacay, Erkan Karademir, Yavuz Karahuseyinoglu, Ayhan Karakaya, Yilmaz Karakaya, Taner Karaman, Hasan Kartal, Erol Kaya, Hakan Kaya, Veysel Kaya, Emin Kayabasi, Recep Kayaci, Sumer Kayser, Halil Kedenek, Giyasettin Kesen, Turan Kesen, Fazli Kesgun, Lokman Keskin, Suat Kibaroglu, Kadir Kilic, Uluc Kilic, Celal Kilinc, as Personal Representative of the Estate of his son, Mustafa Kilinc, deceased, Tayfun Kirim, Gultekin Kiziltas, Hikmet Koc, Ali Kocak, Sultan Kopuz, Enver Korkma, Ismet Koroglu, Mehmet Kucukaydin, Irfan Kumru, Tamer Kumaz, Abdullah Kurt, Muzaffer Kurt, Ali Kus, Kazim Marangoz, Emin M. Mendi, P. Safa Milli, Murat Mutlu, Murat Narin, Ugur Nerece, Adem Oksuz, Inan Oksuz, Selim Omurtag, Mektan Orhan, Hakan Ortac, I. Ahmet Oruc, Seckin Otlu, Cenk Ozak, Cetin Ozaktan, Hikmet Ozata, Orhan Ozcan, Yavuz Ozcelik, Yuksel Ozdemir, Tamer Ozdil, Ismail Ozer, Nurettin Ozer, Ozer Ozerdogan, Suleyman Ozertikin, Ercan Ozgul, Osman Ozgur, Ali Ozsutemen, Suat Oztekin, Enis Ozturk, Muhalip Ozturk, Zeki Ozturk, Mehmet Emir Ozyakar, Murat Pehlivanoglu, Turan Pekdemir, Faruk Pervar, Tuncer Pinar, Taner Piskin, Mustafa Polat, Coskun Puskullu, Alaaddin Sahan, Haydar Sahin, Mustafa Sahin, Zeki Saka, Ferah Salman, Hasan Sanli, Sezai Sanliturk, A. Osman Sarac, M. Hanifi Sariboga, Bayram Saritas, Faruk Sariyildirim, Sedat Sayan, Erol Saydam, Mesut Saylik, Arif Sayoglu, Haluk Sel, Muhittin Abdulkadir Serdar, Abdullah Sert, Ismail Sevim,

Ayhan Sevinc, Recep Sezer, Sedat Sik, Refik Silber, Sezai Simsek, Cevher Siringonca, Suat Songur, Tolga Suruel, Menderes Suslu, Mehmet Tanisk, Celalettin Tavisli, Fahretin Tekin, Ahmet Temel, Ahmet Tikiz, Abdulkadir Tiler, Murat Tilki, Ercan Toktas, Mete Topaloglu, Metin Toptamus, Feremez Torun, Haluk Tosun, Daimi Tosun, Hasan Tuna, I. Halil Tunc, Ugur Tuner, Ferhat Turek, Memis Turker, Murat Turkmeci, Isa Turkyilmaz, Serhat Turkyilmaz, Nail Tutkun, Huseyin Ucar, Yahya Uyanik, Cetin Uyuk, Harun Uzunlu, H. Mehmet Vural, Ayhan Yalgin, Murat Yaliniz, Levent Yasa, Ibrahim Yavuz, E. Murat Yavuz, Saim Yesildag, Mustafa Yigit, Durdu Yildiz, Ismail Yilmaz, Mustafa Yilmaz, Nejdet Yongaci, Sevket Yuruk, Hasan Zorlu;

The United States of America.

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**28 U.S.C. § 2680. Exceptions**

The provisions of this chapter and section 1346(b) of this title shall not apply to –

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer or customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided,* That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

| | | |
|---|---|---|
| AHMET AKTEPE, ET.AL. | ) | CIVIL ACTION |
| Plaintiff, | ) | NO. 94-946-CIV-J-20 |
| | ) | |
| v. | ) | |
| | ) | |
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

STIPULATION OF FACT

For the purposes of this action ONLY the parties hereby stipulate to the following:

1. From September 25, 1992, through October 8, 1992, the navies of several North Atlantic Treaty Organization (NATO) countries, including Turkey and the United States of America, were involved in the combined forces naval exercise, "Exercise Display Determination 1992" (hereinafter DD-92). Admiral J.M. Boorda, United States Navy, Commander in Chief, Allied Forces Southern Europe, was the Commander in charge of all NATO forces participating in DD-92.

2. For the exercise to simulate wartime encounters between opposing powers, the participating forces were divided into two opposing forces, the Brown Forces and the Green Forces. Turkish and American warships, as well as those of other participating NATO countries, were assigned to both the Brown Forces and the Green Forces. Vice Admiral T. Joseph Lopez, USN, was in command of the Brown Forces. Admiral Kroon, Netherlands, was in charge of the Green Forces.

3. The U.S. Navy aircraft carrier USS SARATOGA (CV-60) (hereinafter SARATOGA) was assigned to the Brown Forces, and the Turkish Destroyer TCG MUAVENET (hereinafter MUAVENET) was assigned to the Green Forces.

4. For the "enhanced tactical" or battle problem phase of DD-92, the Brown Forces were to effect an amphibious landing at Saros Bay, Turkey, while the Green Forces were to stop and "destroy" the Brown Forces. Admiral Boorda's orders were for the units comprising the Brown and Green Forces to actively seek and "destroy" each other. Both task force commanders had full authority to engage the "enemy" when and where they judged appropriate "using" all warfare assets to achieve victory. All attacks were supposed to be simulated attacks.

5. On October 2, 1992, during the enhanced tactical phase the SARATOGA fired two Sea Sparrow missiles at MUAVENET.

6. Both of said missiles physically impacted, in whole or in part, the MUAVENET;

7. The missile launch was not the result of any willful, intentional or deliberate misconduct;

8. The missile launch was not the result of any equipment or system failure;

9. The lack of uniform terminology, i.e., the imprecise use of terminology, used by SARATOGA personnel involved in the missile firing, caused a misunderstanding which occasioned the actual firing of the missiles. The failure to communicate clearly and in standard terminology was caused by the lack of a Navy standardized

training and qualification process for Tactical Action Officers (TAO) and Ship's Weapons Coordinators (SWC).

10. The missile launch occurred during a drill aboard the SARATOGA in which the Sea Sparrow system was to be utilized to simulate attacks on nearby ships participating in the ongoing NATO exercise;

11. Rear Admiral Dur, embarked in the SARATOGA, the Battle Group Commander and the Composite Warfare Commander for the task group within the "Brown Forces" to which SARATOGA was assigned during DD-92, approved the SARATOGA's Combat Direction Center Officer's (CDCO) plan to conduct the simulated missile firing drill approximately 25 minutes before it was to occur. The actual procedures for conducting a simulated attack are always the responsibility of the Commanding Officer of each vessel. Thus, the missile firing was internal to SARATOGA.

12. The enlisted Sea Sparrow team did not have notice of this drill prior to the time they were awakened on the evening of October 1, 1992, to conduct the drill;

13. Certain SARATOGA personnel involved in the missile firing were not affirmatively made aware that the drill was a drill, a simulation, not an actual event.

14. The officers running the drill failed to understand the significance of terms and requests made by the missile fire control system operator which included that the missile crew was preparing for an actual missile launch;

15. There were no Navy standard procedures and regulations in existence at the time of the missile firing and applicable to the drill which resulted in the missile

launches which required the repeated announcements of "THIS IS A DRILL" or similar words:

16. The missile launches could have been prevented if a key watch stander, the target Acquisition System operator, had been briefed that only a simulated exercise launch was intended;

17. The missile launches could have been prevented if watch standers within the Combat Direction Center had known the meaning of certain terms being used by the Fire Control Operator which indicated he intended to conduct a live firing;

18. The Target Acquisition System (TAS) operator did not confirm with any officer in the Combat Direction Center his belief that a live firing was intended;

19. SARATOGA TAS console operators understood the term "arm and tune" to require the actual arming of the missiles in preparation for a real firing. Neither the TAO nor the SWC appreciated the significance of this terminology.

20. The term "arm and tune" was used once by the TAS operator in the drill during which the missiles were launched on October 2, 1992.

Seen and agreed to:

Dated: August 28, 1995

/s/ David V. Hutchinson
DAVID V. HUTCHINSON,
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Dated: Sept. 1, 1995

/s/ Kirk A. Guirdy
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*Washington, D.C. 20530*

November 27, 1995

**FEDERAL EXPRESS**
Honorable Harvey E. Schlesinger
United States District Court Judge
U.S. District Court
Federal Courthouse
80 N. Hughey Ave.
Orlando, Florida 32801

RE: Ahmet Aktepe, et. al. v. United States of America, *MDF1 Jacksonville Div., Civil No. 94-946-Civ-J-20*
DJ# 61-17M-366.13

Dear Judge Schlesinger:

In accordance with your request at the close of the arguments on cross-motions for summary judgment, the Government hereby informs the Court that the reciprocity condition of the Public Vessels Act, 46 U.S.C. App. § 785, is satisfied in this action. Consequently, there is no need for a trial of this issue.

Very truly yours,

/s/ David V. Hutchinson
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Supreme Court, U.S.
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No. 97-338

# In the Supreme Court of the United States

OCTOBER TERM, 1997

AHMET AKTEPE, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether claims by active-duty Turkish Navy sailors against the United States under the Public Vessels Act for injuries sustained on the high seas during joint NATO training exercises with the United States Navy were properly dismissed by the courts below.

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# In the Supreme Court of the United States

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 105 F.3d 1400. The opinion of the district court granting summary judgment in favor of the United States (Pet. App. 11-30) is reported at 925 F. Supp. 731. An earlier opinion of the district court denying the United States' motion to dismiss (Pet. App. 27-30) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on February 20, 1997. A petition for rehearing was denied on May 28, 1997. Pet. App. 31-32. The petition for a writ of certiorari was filed on August 22, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Public Vessels Act (46 U.S.C. App. 781 *et seq.*) provides that a private plaintiff may bring a tort action for injury caused by a public vessel of the United States, including a Navy warship, if based on facts that would lead to liability of a private shipowner under similar circumstances. That Act incorporates by reference the consistent provisions of the Suits in Admiralty Act (46 U.S.C. App. 741 *et seq.*). See *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 170-171 (1976). Those statutes waive the sovereign immunity of the United States for actions covered by their terms. The Death on the High Seas Act (46 U.S.C. App. 761 *et seq.*) creates a maritime cause of action for fatal injuries caused by tortious acts on the high seas.

2. Beginning in September 1992, the navies of several North Atlantic Treaty Organization (NATO) countries, including Turkey and the United States, participated in an international, combined-forces naval exercise. The Commander in Chief of the Allied Forces Southern Europe—Admiral J.M. Boorda of the U.S. Navy—was the commander in charge of all forces participating in those exercises. Pet. App. 2.

The exercises simulated wartime encounters, with the participating units divided into two opposing forces, the Brown Forces and the Green Forces. Vice Admiral T. Joseph Lopez of the U.S. Navy commanded the Brown Forces; Admiral Kroon of the Netherlands commanded the Green Forces. The participating NATO countries' warships, including those from Turkey and the United States, were assigned to both the Brown Forces and the Green Forces. Pet. App. 2. The U.S. Navy aircraft carrier USS SARATOGA

(the SARATOGA) was assigned to the Brown Forces, and the Turkish destroyer TCG MUAVENET (the MUAVENET) was assigned to the Green Forces. *Ibid.*

The "enhanced tactical" or battle problem phase of the exercises required the Brown Forces to carry out an amphibious landing at Saros Bay, Turkey. The mission of the Green Forces was to stop and "destroy" the Brown Forces. Admiral Boorda ordered the Brown and Green Forces actively to seek and "destroy" each other. Pet. App. 2. Both task force commanders had full authority to engage the "enemy" when and where they judged appropriate, "using" all weapons to achieve victory. All attacks were to be simulated attacks. *Id.* at 2-3.

3. On October 2, 1992, the SARATOGA's Combat Direction Center Officer proposed a simulated missile firing drill using the SARATOGA's Sea Sparrow weapons system. That plan was approved by the Battle Group Commander and the Composite Warfare Commander for the Brown Forces. Pet. App. 3, 15.[1] For the drill, enlisted personnel on the Sea Sparrow team were awakened in the middle of the night; some members of the team were not aware that the exercise was a drill. The SARATOGA mistakenly fired two Sea Sparrow missiles at the MUAVENET, damaging the ship and resulting in the deaths of and injuries to Turkish crew members. *Ibid.*

Petitioners filed suit in district court, alleging negligence and seeking damages for injuries and wrongful deaths arising out of the missile firing. Pet.

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[1] Procedures aboard the SARATOGA, including those related to any simulated attacks, were the responsibility of the commanding officer. Pet. App. 3, 15.

App. 4, 17. The district court denied the government's motion to dismiss under the *Feres* doctrine (see *Feres* v. *United States*, 340 U.S. 135 (1950)), finding that the government had failed to establish all of the necessary elements for dismissal under that doctrine. Pet. App. 18, 27-30. After the parties entered into a stipulation of facts, the court granted the government's motion for summary judgment, *id.* at 11-26, holding that the complaint raises a non-justiciable political question, *id.* at 24-25.[2]

4. The court of appeals affirmed. Pet. App. 1-10. Applying the analysis provided by this Court in *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), the court held that "[t]his suit exhibits most, if not all, of the indicia of political questions identified * * * in *Baker* v. *Carr*." Pet. App. 7. First, the court held that "[t]he underlying events involve two nations engaged in a NATO training exercise," which is "a matter of foreign policy." *Ibid.* Second, the court concluded that it lacked the competence to determine whether the Navy conducted the missile firing drill in a negligent manner. *Id.* at 8. Third, the court recognized that "resolving this case inevitably would require that courts make initial policy decisions of a kind appropriately reserved for military discretion, [i.e. whether] the Navy behaved negligently when it declined to advise each member of the Sea Sparrow missile team that the firing was a drill." *Id.* at 9. Fourth,

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[2] The district court held that it was "not qualified to make the determination of whether it was reasonable for the Navy to act in the manner in which it did, because the Court can not determine what level of information would be required to render the drill safe while at the same time retaining its usefulness as an accurate reflection of the Navy's preparedness for battle." Pet. App. 24-25.

the court opined that "adjudicating this case would express a lack of respect for the political branches of government by subjecting their discretionary military and foreign policy decisions to judicial scrutiny, notwithstanding the judiciary's lack of expertise in these areas." *Ibid.* The court concluded by stressing that petitioners' complaint would "launch a * * * sweeping assault on the Navy's practices * * * [as] [t]he complaint alleges negligence relating to Navy communication, training, and drill procedures." *Id.* at 10.

## ARGUMENT

The courts below properly held that petitioners may not recover damages from the United States under the Public Vessels Act for injuries they sustained during their participation in NATO military exercises on the high seas. Petitioners contend that this case does not implicate the political question doctrine. The court of appeals correctly rejected that argument in the unique circumstances of a multinational joint military training exercise. For many of the same reasons, petitioners' claims against the United States are in any event barred by the *Feres* doctrine, since those claims are based on alleged injuries incident to their service under U.S. command. Further review is not warranted because this suit was properly dismissed and because no other court has permitted a suit by foreign military personnel under the Public Vessels Act to proceed in such circumstances.

1. Petitioners contend (Pet. 4) that the decision of the court of appeals "conflicts * * * with the purposes of the political question doctrine." That argument is not supported by the decisions of this

Court. In *Baker* v. *Carr*, 369 U.S. 186 (1962), this Court identified six independent circumstances that may indicate the presence of a non-justiciable political question (*id.* at 217):

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Contrary to petitioners' suggestion (Pet. 4, 11), the political question doctrine is not "new protection the Eleventh Circuit has devised." Rather, that doctrine is rooted in the constitutional principle of separation of powers and ensures that the judiciary assumes a properly limited role under our tri-partite system. See *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 165-166 (1803); *Laird* v. *Tatum*, 408 U.S. 1, 15 (1972). As recognized by the court of appeals, that principle does not insulate "every case or controversy which touches foreign relations." Pet. App. 6 (quoting *Baker*, 369 U.S. at 211). Instead, a determination concerning the presence of a political question requires "discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial

handling in light of its nature and posture in the specific case, and the possible consequences of judicial action." *Ibid.* (quoting *Baker*, 369 U.S. at 211-212). The court of appeals carefully analyzed petitioners' claims under the quoted standards and correctly concluded that they implicate those justiciability concerns. The Public Vessels Act did not open the U.S. courts to suits against the United States where those factors are present.

Executive Branch decisions concerning foreign relations and military operations are inherently political in nature: "Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views." *Baker*, 369 U.S. at 211 (footnote omitted). Petitioners nevertheless assert (Pet. 5-6) that this suit should be permitted to proceed because they seek only damages.[3] That contention is incorrect.

a. Petitioners maintain (Pet. 4-5) that the decision of the court of appeals conflicts with this Court's decisions in *Scheuer* v. *Rhodes*, 416 U.S. 232

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[3] Petitioners' citation (Pet. 6) to a case involving a car accident between two off-duty service members does not support that proposition. In *Taber* v. *Maine*, 67 F.3d 1029, 1038-1050 (2d Cir. 1995), the court held that the *Feres* doctrine did not preclude a service member's action to recover damages resulting from a collision with a car driven by another service member, as both service members were on liberty, the accident occurred off-base, and the injury was not incident to their service and did not involve military discipline issues. See discussion at page 15, *infra*.

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(1974), and *Gilligan* v. *Morgan*, 413 U.S. 1 (1973). In *Scheuer*, the district court dismissed on Eleventh Amendment grounds a suit for damages against the National Guard in Ohio for its activities relating to the Kent State University shootings. The court of appeals alternatively relied upon the doctrine of executive immunity for the defendant state officials. Those rulings, however, did not involve the political question doctrine. In allowing the suit to proceed, this Court noted that, in its earlier decision in *Gilligan*, it had not foreclosed all possibility of judicial review of National Guard activities. 416 U.S. at 248-249. But because the justiciability issue was not analyzed by this Court in *Scheuer* itself, that case scarcely can be thought to require the courts to hear petitioners' claims, especially since they arise out of the quite different circumstances of a joint military training exercise on the high seas.

The rationale used by the Court in *Gilligan* to find non-justiciable a suit seeking judicial supervision over the operation and training of the Ohio National Guard applies here as well. There, this Court stated:

> It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject

> *always* to civilian control of the Legislative and Executive Branches.

413 U.S. at 10. Although this Court in *Gilligan* did not foreclose the possibility that there may be accountability in a judicial forum for some official misconduct by military personnel, *id.* at 11-12, it noted that "no such questions are presented in this case," *id.* at 12. Petitioners thus can cite no decision of this Court for the view that a suit for damages must always be justiciable notwithstanding the political question doctrine.

b. Petitioners also contend (Pet. 4, 6-11) that the decision below conflicts with decisions of the Second, Ninth and Tenth Circuits, which they characterize as "exemplify[ing] the *Gilligan-Scheuer* principle that damages suits are normally not subject to the political question defense." Pet. 9. In none of the cases cited by petitioners, however, were military discipline or direct military or foreign policy determinations of the United States at issue.[4] See, *e.g.*, *Klinghoffer* v.

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[4] Petitioners' reliance (Pet. 8-9) on cases involving nuclear power plants is misplaced. Although the propriety of a decision to conduct nuclear-related activities may involve political questions, individual tort recoveries stemming from such activities in the domestic setting are not precluded under that doctrine. *McKay* v. *United States*, 703 F.2d 464, 470 (10th Cir. 1983) (neighboring landowners may seek recovery for injuries arising from federal government's operation of nuclear weapons manufacturing plant). Likewise in *Bennett* v. *Mallinckrodt, Inc.*, 698 S.W.2d 854 (Mo. Ct. App. 1985), cert. denied, 476 U.S. 1176 (1986), the Missouri Court of Appeals rejected a privately owned nuclear power plant's arguments that the Atomic Energy Act of 1954, which regulates nuclear power, triggered the political question doctrine, and held that nearby residents' claims for damages for injuries resulting

*S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 937 F.2d 44 (2d Cir. 1991) (whether the Palestine Liberation Organization had breached its duty of due care and could be held liable for the murder of an American citizen during an attack on a ship); *Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995) (whether individual defendants who were alleged to have been responsible for torture, mass rape, and war crimes committed in Bosnia against civilian Bosnian women may be sued in federal district court under the Alien Tort Statute, 28 U.S.C. 1350), cert. denied, 116 S. Ct. 2524 (1996). Petitioners' reliance on cases allowing damages actions in cases brought by civilians are likewise inapposite. See, *e.g.*, *Koohi* v. *United States*, 976 F.2d 1328, 1331-1332 (9th Cir. 1992) (finding no political question in suit concerning destruction of a civilian Iranian passenger aircraft by a U.S. naval warship), cert. denied, 508 U.S. 960 (1993). Unlike the plaintiffs in *Koohi*, petitioners here were active-duty service members aboard a foreign warship participating in an international military exercise; they were members of an allied naval force; and they fell within a chain of command headed by a U.S. naval officer. Importantly, the injuries complained of arose solely as an incident of that service. As noted by the district court, petitioners' "attempt to classify themselves as civilians rather than as members of the armed services * * * [is] less than accurate." Pet. App. 22.[5]

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from plant activities were "a cost of doing business." *Id.* at 864.

[5] Contrary to petitioners' suggestion (Pet. 8), *Koohi* is readily distinguishable. First, the status of those injured—active military personnel here versus civilians in *Koohi*—implicates the political nature of the case in a far more

c. Nor did the cases cited by petitioners arise in the context of a multi-lateral treaty that contains its own dispute resolution mechanisms. The NATO member states have adopted a Status of Forces Agreement (SOFA), T.I.A.S. No. 2846, pursuant to which liabilities of the member states have been delineated. Article VIII(4), for example, provides that "[e]ach Contracting Party waives all its claims against any other Contracting Party for injury or death suffered by any member of its armed services while such member was engaged in the performance of his official duties." T.I.A.S. No. 2846, at 12. Whether in spite of that provision petitioners have a colorable claim under (or separate from) the SOFA would involve interpretation of that agreement.[6] The

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significant way. Furthermore, the incidental firing of missiles at the Iranian airplane does not involve the same policy considerations as are present in the joint military operations at issue here. Thus, the injuries sustained by petitioners give rise to important questions of military and foreign policy not implicated in *Koohi*.

[6] Petitioners contend that the SOFA does not apply to injuries occurring on the high seas. See Pet. 13 n.14. It is important to note, however, that the SOFA was adopted against the background of the Brussels Convention of 1926, pursuant to which states did not waive immunities "when the cause of action arises on Government and non-commercial service" with regard to "ships of war, State-owned yachts, patrol vessels, hospital ships, fleet auxiliaries, supply ships and other vessels owned or operated by a State." International Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Ships, Brussels, Apr. 10, 1926, *reprinted in* 4 *International Maritime Law Conventions* 3096 (M. Singh ed. 1983). Although the United States was not a party to the Brussels Convention, virtually all of the NATO member states ratified that convention. Thus, the prevailing background principle at the time most of the NATO members ratified the

SOFA provides for a claims procedure (including arbitration) in certain circumstances (but denies it in others) when injury is suffered by third parties other than the Contracting Parties. Compare Art. VIII(8) at 16 with Art. VIII(5)(h) at 16. In any event, issues relating to the workings of NATO are subjects for consideration by the NATO Council, which consists of representatives of the member states, and for the respective dispute resolution mechanisms within NATO. See North Atlantic Treaty, Apr. 4, 1949, Art. 9, 63 Stat. 2244.

The decision by the court below to dismiss the lawsuit thus reflects a proper respect for the Exec-

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SOFA was that warships would not be liable for incidents like the one that occurred in this case.

The most that can be said in petitioners' favor about the SOFA itself is that it is ambiguous on this point. Article XX(1) of the SOFA provides that, "[s]ubject to the provisions of paragraphs 2 and 3 of this Article, the present Agreement shall apply only to the metropolitan territory of a Contracting Party." T.I.A.S. No. 2846, at 28. Paragraphs 2 and 3 of that article, however, make clear that that limitation is designed to exclude territories of a nation (such as Guam and the Northern Mariana Islands) as not being within the "metropolitan territory" of a Contracting Party. That limitation, in turn, is relevant only to those aspects of the SOFA that contain a limitation on territory, which Article VIII(4) does not. Cf. Art. VIII(5) at 14 (describing dispute resolution mechanism for claims arising out of "any other act, omission or occurrence for which a force or civilian component is legally responsible, and causing damage *in the territory* of the receiving State to third parties, other than any of the Contracting Parties") (emphasis added). Because "[a] treaty is in the nature of a contract between nations," *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 253 (1984), its dispute resolution mechanisms should be given full effect before permitting resort to the municipal courts of one contracting party.

utive Branch's authority to conduct diplomatic and military relations with other nations. It also reflects a recognition that United States courts are not the appropriate forums for resolving liability issues in joint military training exercises involving allies of the United States pursuant to multi-lateral relationships that provide a basis for negotiated resolution of claims and disputes.

d. Finally, petitioners contend (Pet. 14) that this is a "simple and clear" case in which the government has provided a "virtual confession of negligence," and that it does not implicate any "judicial intrusion into military practices." That argument overlooks the analysis in which a court would have to engage to determine whether the actions could be deemed negligent under the standards of domestic tort law. Indeed, petitioners' argument is belied by the very nature and scope of the complaint.[7] Although the stipulation of facts entered into by the parties (see Pet. App. A39-A43) served in one sense to narrow the focus of disagreement, nothing in that stipulation purports

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[7] Petitioners allege the following negligent acts: (1) the "absence of adequate communication among personnel associated with the operation of the Sea Sparrow System"; (2) the "last-minute decision by SARATOGA Operational Watch Officers to conduct an ad hoc drill using the Sea Sparrow System to simulate attacks on nearby ships participating in the ongoing NATO exercise"; (3) the "decision to awaken the enlisted Sea Sparrow team to participate in the no-notice drill"; (4) the "failure to advise the oncoming missile system's operators that what was contemplated was a drill, a simulation, and not an actual event"; and (5) the "failure of the officers running the drill to understand the significance of terms and requests made by the missile fire control system operator which indicated that the missile crew was preparing for an actual missile launch." Pet. App. 17.

to foreclose any avenues of factual development that might be pursued in defense of the lawsuit, were it permitted to proceed. Based on the allegations contained in the complaint, the stipulated facts, and reasonable defenses to the complaint, the district court would have to delve into the details of training and communications aboard an aircraft carrier during a joint military training exercise. That "problematic" inquiry would "call into question military discipline and decisionmaking [and] would itself require judicial inquiry into, and hence, intrusion upon, military matters." *United States* v. *Stanley*, 483 U.S. 669, 682 (1987). Petitioners' suggestion (Pet. 14) that this inquiry would be unnecessary because the court could simply predicate liability on the doctrine of *res ipsa loquitur* fails to acknowledge that even that doctrine permits a defendant to rebut an inference of negligence. See, *e.g.*, *United States* v. *Baycon Indus., Inc.*, 804 F.2d 630, 634 (11th Cir. 1986).

2. The judgment of the court of appeals is in any event correct because petitioners' suit is barred by the *Feres* doctrine. See *Feres* v. *United States*, 340 U.S. 135 (1950). The court of appeals declined to reach the *Feres* issue. Pet. App. 4 n.1. In its initial consideration of the *Feres* defense, the district court had denied the government's motion to dismiss under *Feres* because, "at that time," the government had "failed to show that [petitioners] were under the supervision of an American superior * * * and it failed to show that there was an alternative source of compensation available to [petitioners]." *Id.* at 18 & n.1. Upon reconsideration, however, the court acknowledged that the United States had since furnished additional information and that "it is likely that this case would be dismissed on that basis [the

*Feres* doctrine] in light of the additional information which has been provided." *Ibid.*

As recognized by this Court, *Feres* and its progeny prohibit suits brought by U.S. military personnel against the United States for injuries sustained incident to their service, because such actions would "involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *United States* v. *Johnson*, 481 U.S. 681, 690 (1987).[8] Under similar circumstances involving non-American service members working under American commanders, *Feres* has been found applicable. See *Daberkow* v. *United States*, 581 F.2d 785, 788 (9th Cir. 1978) ("The relationship between a foreign soldier engaged in joint military activities and his American superiors is similar to the relationship of an American soldier to an American superior; military discipline could be disrupted just as much by a foreign serviceman's lawsuit as by an American's."); *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762, 779-780 (1980) (holding that *Feres* doctrine barred suits by Australian service members who claimed injury from expense to the herbicidal Agent Orange in Vietnam War), on reconsideration, 580 F. Supp. 1242 (E.D.N.Y. 1984), appeal dismissed, 745 F.2d 161 (2d Cir. 1984). Indeed, the district court in this case stated that, although petitioners "were actually part of another country's armed forces, they should be treated as though they were serving within the Executive Branch for the purpose of determining

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[8] Suits arising in circumstances covered by *Feres* have been held to be barred under the Public Vessels Act as well. See, *e.g.*, *Cole* v. *United States*, 755 F.2d 873, 876 n.7 (11th Cir. 1985).

whether the Court should refrain from deciding this case." Pet. App. 23.

Because of the joint nature of the NATO military exercises, in which all forces were under the command of a U.S. Navy admiral, the Turkish sailors should not be afforded a cause of action in United States courts that is unavailable to United States service members involved in the same exercise.[9] Such preferential treatment for foreign service members would undermine the morale of the forces and subject the U.S. command to the sort of intrusive inquiry by civilian courts into internal military affairs that *Feres* held to exceed the scope of the United States' waiver of sovereign immunity to ordinary tort suits. See *Johansen* v. *United States*, 343 U.S. 427, 432 (1952) ("[I]t is the duty of this Court to attempt to fit the Public Vessels Act, as intelligently and fairly as possible, 'into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole.'") (quoting *Feres*, 340 U.S. at 139); *Blakey* v. *U.S.S. Iowa*, 991 F.2d 148, 151

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[9] This action also may well be barred as arising out of discretionary functions regarding the manner in which a naval training exercise will be conducted, including the nature of the instructions provided. The Public Vessels Act has been construed not to allow recovery in circumstances analogous to those in which a suit would be barred under the discretionary function exception to the Federal Tort Claims Act. See *United States Fire Ins. Co.* v. *United States*, 806 F.2d 1529 (11th Cir. 1986). Although the discretionary function bar was not raised in the district court, it is jurisdictional, and thus could be raised in the course of any further proceedings in the district court. Immunity based on discretionary functions further underscores the soundness of the lower courts' dismissal of this case and further attenuates any possibility that petitioners could ultimately recover.

(4th Cir. 1993). Thus, just as the *Feres* doctrine contemplates that U.S. military personnel must look to the special medical and other benefits Congress has made available to them, *Johansen*, 343 U.S. at 440; *Feres*, 340 U.S. at 144, that doctrine contemplates that foreign military personnel seeking recovery in circumstances such as these must look to whatever benefits their own government has made available to its military personnel.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1997

# REPLY

# BRIEF

(3)

Supreme Court, U.S.
FILED
DEC 3 1997
CLERK

No. 97-338

In The

# Supreme Court of the United States

October Term, 1997

AHMET AKTEPE, ET AL.,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

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## PETITIONERS' REPLY BRIEF

The Government's Brief in Opposition subtly distorts the facts and procedural posture of the present case. It also misinterprets the Public Vessels Act, the NATO Status of Forces Agreement, and this Court's decision in *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Moreover, it claims undue breadth for the political question, *Feres*, and discretionary function doctrines.

### I. In the Trial Court, the Government Effectively Conceded Liability on the Merits.

The Brief in Opposition (Opp. 13-14) errs in asserting that "avenues of factual development" beyond the confines of the Stipulation of Fact (Pet.App. 39-43) have not been foreclosed. On the contrary, they have been *expressly* foreclosed. In the United States District Court for the Middle District of Florida, the Government and the plaintiffs entered into a binding pretrial order[1] that confined the trial of the liability issue to the Stipulation of Fact (Pet.App. 39-43). The only liability issues that could arise at trial of the merits of this case would necessarily be confined to exploring the meaning of the Stipulation of Fact.[2] At the Pretrial Conference that occurred on

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[1] It is familiar law that a "pre-trial order is treated as superseding the pleadings and establishes the issues to be considered at trial." *Erff v. MarkHon Industries, Inc.*, 781 F.2d 613, 617 (CA7 1986); see Fed. R. Civ. P. 16(e). Local Rule 3.06(e) of the Middle District of Florida explicitly states that "[a]ll pleadings . . . shall be deemed to be merged [in the] pretrial order [which] will control the course of the trial and may not be amended except by order of the Court in the furtherance of justice."

[2] The Pretrial Order, Nov. 3, 1995, states at p. 3 that "this action shall proceed to trial pursuant to the pretrial stipulation

November 3, 1995, Judge Schlesinger asked both counsel whether they proposed to offer any additional liability evidence or raise any additional liability issues beyond the confines of the Stipulation of Fact. At pp. 34-35 of the Transcript of Pretrial Proceedings, each said no. For the plaintiffs, Mr. Duẽ responded as follows:

> *THE COURT: Is there any additional evidence that you want to present other than what's in your motions on the liability question?*
>
> *MR. DUẼ: No, Your Honor.*

For the Government, David V. Hutchinson, Esq., the Government's trial counsel, responded as follows:

> *THE COURT: What do you think on time, on the liability issue only [as opposed to individual damages issues]?*
>
> *MR. HUTCHINSON: The liability issue, I don't think at this point either side intends to call anybody. We're pretty much on the legal issues. That's pretty much where it is.*

The Stipulation of Fact comes about as close to conceding negligence liability as one could do, short of using

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and this Order and no amendments shall be made to the stipulation or this Order except upon written motion and good cause shown." The Pretrial Stipulation states (at p. 2, under the heading "Contentions of the Parties") that both parties rest on the Stipulation of Fact and that neither contemplates the introduction of evidence on the issue of liability. Again at p. 3, under the heading "Plaintiffs' Contentions," it states that "the Court need take no testimony on the liability issue." On the same page, the section captioned "Contentions of the United States of America" concedes that "two Sea Sparrow missiles were mistakenly fired from the USS SARATOGA and struck the TCG MUAVENET and that some of the Plaintiffs suffered personal injuries as a result of that incident" and mentions only a single liability issue: "[I]t is contended the purely emotional distress Plaintiffs have no cause of action in admiralty."

the word "negligence." See ¶¶13-17, Pet.App. 41-42. Even aside from the Government's representation that it would not go beyond the Stipulation of Fact in trying this case on the merits, it is very difficult to imagine the factual defense that could be offered. Please note that the Brief in Opposition is exceedingly vague about the "avenues of factual development that might be pursued in defense of the lawsuit" (Opp. 14). Petitioners have repeatedly asked Government counsel for clarification of this claim, to no avail.

## II. The Government Errs in Suggesting that the Missile Drill Had High-Level Oversight.

A key portion of the Stipulation of Fact establishes that "the missile firing was internal to Saratoga" (¶11, Pet.App. 41). When the Brief in Opposition asserts that the drill was "approved by the Battle Group Commander and the Composite Warfare Commander" (Opp. 3), it omits to mention that these two titles belonged to the same man, Admiral Dur, who happened to be aboard the Saratoga when the plan was hatched (¶11, Pet.App. 41).

## III. The Turkish Sailors Were Not Under U.S. Navy Command.

The assertion in the Brief in Opposition that the wounded Turkish sailors "fell within a chain of command headed by a U.S. naval officer" (Opp. 10) is mistaken. No one was aboard the Muavenet except Turks. The plaintiffs answered to their Turkish superiors, who in turn answered ultimately to the Dutch admiral (Admiral Kroon) at the head of the Green Forces, who in turn answered to Admiral Boorda. In heading the Green Forces Admiral Kroon was asserting authority derived from NATO, not his native country. Similarly, Admiral Boorda, in overall command of the operation, derived his

authority from NATO. It is not reasonable to suppose that Turkey would place its Navy under the command of an American. Petitioners believe that a classified NATO document identified as AF SOUTH Military Committee Memorandum 324 – first issued in 1978 and revised in 1988 and 1994 – was the source of Admiral Boorda's command. His authority over the Turkish ship derived from NATO, not the United States.

On the world stage, the United States is currently asserting that the presence of United States nationals among the UN weapons inspectors in Iraq does not detract from the UN nature of the inspection operation. Identical reasoning should obtain here.

## IV. By Its Clear Terms, the Public Vessels Act Authorizes the Present Action.

The Brief in Opposition errs in indicating that the Public Vessels Act, 46 U.S.C. app. 781 et seq., is limited to "private plaintiff[s]" (Opp. 2). The statute contains no language to that effect,[3] and it has repeatedly and routinely been construed to permit actions against the United States by States and by foreign governmental entities. See *Kunglig Jarnvagsstyrelsen v. United States,* 19 F.2d 761 (CA2 1927) (Suits in Admiralty Act action by Swedish governmental entity); *Ozanic v. United States,* 188 F.2d 228, 231 (CA2 1951) (dictum that "the Yugoslav Government [could have] sued in the district court under the Public Vessels Act"); *State of Maine v. United States,* 45 F.Supp. 35 (D.Me. 1942), *aff'd,* 134 F.2d 574 (CA1), *cert. denied,* 319 U.S. 772 (1943) (entertaining a libel by the

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[3] 46 U.S.C. app. 783 regulates cross-libels, set-offs, and counterclaims in situations in which the United States has sued "a privately owned vessel" and expresses no limit on who can initiate an action against the United States.

State of Maine under the Public Vessels Act for damage to a bridge).[4]

If a foreign or state governmental entity can sue under the Public Vessels Act, *a fortiori* there is no obstacle presented by the fact that the victims of the Saratoga's negligence were members of the Turkish navy. And note that the Public Vessels Act explicitly contemplates suits by foreign nationals, setting a reciprocity condition in 46 U.S.C. app. 785[5] that the Government concedes has been satisfied here (see Pet.App. 44).

## V. The NATO Status of Forces Agreement Has No Bearing on the Present Matter.

The Government's contention that further proceedings in this case "would involve interpretation" of NATO-SOFA (Opp. 11) overlooks the language of that treaty's Preamble (emphasis added):

> The Parties to the North Atlantic Treaty signed in Washington on 4 April, 1949,
>
> Considering that the forces of one Party may be sent, by arrangement, to serve *in the territory of another party;*
>
> Bearing in mind that the decision to send them and the conditions under which they will be sent, in so far as such conditions are not laid

---

[4] The *State of Maine* court dismissed the case for lack of admiralty jurisdiction because the damage caused by the U.S. public vessel (to a bridge) was deemed to have occurred on land. The Admiralty Extension Act, 46 U.S.C. app. 740, now provides for admiralty jurisdiction in such situations.

[5] "No suit may be brought under this chapter by a national of any foreign government unless it shall appear to the satisfaction of the court in which suit is brought that said government, under similar circumstances, allows nationals of the United States to sue in its courts."

> down in the present Agreement, will continue to be the subject of separate arrangements between the Parties concerned;
>
> Desiring, however, to define the status of such forces *while in the territory of another Party;*
>
> Have agreed as follows. . . .

Immediately following the Preamble, Article I repeats the limitation to the *territory* of the contracting parties, defining the pervasive term "force" as "the personnel belonging to the land, sea or armed air services of one Contracting Party *when in the territory of another Contracting Party. . . .* " Article XX(1) again repeats the idea, stating that "[s]ubject to the provisions of paragraphs 2 and 3 of this Article, *the present Agreement shall apply only to the metropolitan territory of a Contracting Party.*"

The Government is wrong to suggest (Opp. 12 n.6) that paragraphs 2 and 3 of Article XX somehow produce an ambiguity as to the meaning of "territory." Those two paragraphs deal with "territories for whose international relations [a NATO partner] is responsible" and thus color the term "metropolitan" rather than the term "territory." The Preamble, Article I, and Article XX(1) thus all say the same thing: NATO-SOFA of its own force does not touch events on the high seas.[6]

As noted above, the Preamble contemplates "separate arrangements" between NATO parties to individual operations. The United States and Turkey did enter into a "Memorandum of Understanding Between the Turkish General Staff (TGS) And the United States European Command (USEUCOM) Concerning the Provision of Host

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[6] Nor does the alleged "background of the Brussels Convention of 1926" (Opp. 11 n. 6) import any ambiguity. SOFA was adopted in 1951, and it is quite unlikely that the parties to it were even remotely thinking about an obscure 1926 convention that the United States never ratified or acceded to.

Nation Support to U.S. Forces During Display Determination 92 (DD-92)." Nothing in this Memorandum of Understanding purported to treat events occurring on the high seas.

The Brief in Opposition is the first time the Government has even hinted that NATO-SOFA has any potential applicability here. Plainly it does not. Moreover, the Government has waived any argument to the contrary. The Navy sent a letter – captioned "General Claims Guidance for Claimants" – to each of the plaintiffs, outlining Navy JAG's settlement authority and informing each potential plaintiff that, settlement failing, suit would need to be filed in a United States District Court within two years "under either the Suits in Admiralty Act . . . or the Public Vessels Act." This letter is set forth *infra* as Appendix A; it shows that the Brief in Opposition is mistaken in attempting to bring SOFA into play at this late date.

## VI. The Brief in Opposition Takes Liberties with Key "Political Question" Jurisprudence.

The Government correctly notes (Opp. 6-7) that *Baker v. Carr*, 369 U.S. 186, 211 (1962) – which held that the composition of the Tennessee legislature *was* justiciable – insists that the political question doctrine requires "discriminating analysis of the particular question posed," but otherwise eschews any attention to the *particular* liability question posed by the present case. Instead, it offers a gross generalization: "Executive Branch decisions concerning foreign relations and military operations are inherently political in nature" (Opp. 7). The generalization is inapposite: This lawsuit does not challenge any "Executive Branch decisions" but only the inadvertent lapses of a handful of enlisted men and junior officers aboard the Saratoga.

Moreover, *Scheuer v. Rhodes*, 416 U.S. 232 (1974), shows that the generalization is not only inapposite but wrong; ordinarily it does not apply to damages suits. In holding that the Kent State shootings were justiciable, the *Scheuer* Court referred repeatedly (see *id.* at 234, 249) to *Gilligan v. Morgan*, 413 U.S. 1 (1973), in which the Court had indicated (at 11-12) that while injunctive relief to reform the Ohio National Guard was not justiciable, a damages suit would probably lie. The Government's assertion that "the justiciability issue was not analyzed by this Court in *Scheuer* itself" (Opp. 8) is a meaningless technicality. There is no doubt that *Gilligan* and *Scheuer* placed this Court squarely behind the proposition that damages suits are presumptively justiciable.[7]

The Brief in Opposition resorts to verbal sleight-of-hand in its efforts to distinguish *Koohi v. United States*, 976 F.2d 1328 (CA9 1992), *cert. denied*, 508 U.S. 960 (1993). Not content with the erroneous claim that the Turkish sailors were under U.S. Navy command, the Opposition contrasts "the incidental firing of missiles at the Iranian airplane" with the "policy considerations . . . present in the joint military operations at issue here" (Opp. 11 n.5). Obviously this is an "apples and oranges" feint. The correct comparison is between the incidental firing of the *Koohi* missiles and the accidental and wholly inadvertent firing of the Saratoga missiles. It is hard to see the difference.

## VII. Neither *Feres* Nor "Discretionary Function" Affords a Legitimate Basis for Dismissing this Suit.

*United States v. Johnson*, 481 U.S. 681, 688-91 (1987), holds that *Feres* bars adjudication in cases in which "three

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[7] That same proposition was *spelled out* by the courts in *Klinghoffer v. Palestine Liberation Organization*, 937 F.2d 44, 49 (CA2 1991) and *Kadic v. Karadzic*, 70 F.3d 232, 249 (CA2 1995), *cert. denied*, 116 S.Ct. 2524 (1996).

broad rationales" are implicated. None of the three is implicated here. (1) There is no "distinctively federal" relationship between the Turkish sailors and the United States Government, and these claims are governable by the general maritime law, not potentially disparate state law. (2) The Turkish sailors are not entitled to the "comprehensive system of benefits" available to U.S. servicemen under the Veterans Benefits Act, nor indeed to any compensation from any other source than their potential tort claims.[8] (3) No inquiry into "sensitive military affairs" is involved in the instant action, which asserts only that it is tortious to mistakenly destroy a friendly ship.[9]

*Johnson* is further noteworthy because four members of the Court, led by Justice Scalia, asserted that "*Feres* was wrongly decided and heartily deserves 'the widespread, almost universal criticism' it has received." 481 U.S. at 700.

The discretionary function doctrine did not bar litigation against the Government in *Peterson v. United States*, 673 F.2d 237 (CA8 1982) (low flight, sonic boom), *Ward v. United States*, 471 F.2d 667 (CA3 1973) (same), or *Goodwin*

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[8] The Turkish Government furnished in-kind medical care on a short term basis to some of the plaintiffs.

[9] Neither *Daberkow v. United States*, 581 F.2d 785 (CA9 1978), nor *In re Agent Orange*, 506 F.Supp. 762 (E.D.N.Y. 1984), is on point. In *Daberkow* a West German airman was killed while being trained at an Air Force base in this country, and his widow's lawsuit directly challenged the orders her husband had received from his American superior. The Australian victims in *Agent Orange* conceded "the existence of a compensation scheme for Australian veterans similar to that provided by the United States government." 506 F.Supp. at 780. Moreover, the reasoning of *Agent Orange* has been subjected to serious criticism. See, e.g., *Del Rio v. United States*, 833 F.2d 282, 287 n. 8 (CA11 1987).

*v. United States*, 141 F.Supp. 445 (E.D.N.C. 1956) (Marine Corps inadvertently dropped a bomb on a fishing vessel). It would not apply in the present case either. That is presumably why the Government has not (aside from Opp. 16 n.9) urged it.

## VIII. Conclusion

The petition for a writ of certiorari should be granted.

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## GENERAL CLAIMS GUIDANCE FOR CLAIMANTS

The following is a brief explanation of the applicable laws regarding death, personal injury and property damage claims filed against the U.S. Navy.

Acting on behalf of the U.S. Secretary of the Navy, the Admiralty Division of the Office of the Judge Advocate General of the U.S. Navy is responsible for the adjudication of all tort claims arising on the high seas and stemming from the operation of U.S. Navy vessels or otherwise involving naval personnel or property. The Admiralty Division can be contacted by mail at the following address:

> Department of the Navy
> Office of the Judge Advocate General
> Admiralty Division – Code 31
> 200 Stovall Street
> Alexandria, VA (USA) 22332-2400.

The U.S. Secretary of the Navy has authority, pursuant to Title 10 of the United States Code, section 7622 (1988), to settle claims arising on the high seas for damage caused by a U.S. Navy vessel or other property of the Navy, or by a tort committed by an agent or employee of the Navy, where legal liability exists and the matter is not in litigation. The Secretary's authority is subject to a two-year limitation period, which is not extended by the filing of a claim or by any correspondence or negotiations related to a claim. In other words, a claim must be approved for payment within two years of the date on which it arose. Notice of this two-year limitation period is provided to

the public at Title 32 of the Code of Federal Regulations, section 752.3(d) (1990).

Further, suits against the United States based upon torts committed by agents or employees of the Navy, or for damages caused by a Navy vessel, where the incident giving rise to the suit occurred on the high seas must be brought under either the Suits in Admiralty Act, Title 46 of the United States Code, Appendix sections 741-752 (1988), or the Public Vessels Act, Title 46 of the United States Code, Appendix sections 781-790 (1988). Both of these statutes contain two-year limitation periods running from the date of the event upon which a suit is based. You are also advised that the only proper forum for such litigation is a United States District Court.

There is no particular form for asserting an admiralty claim against the United States, but satisfactory proof of liability and damages must be presented. The claimant must provide adequate documentation of the amount of damages.

Acknowledgment of receipt:

_____ _____

(claimant's signature) (date)